APAAC 2014 Seminar: Rape Shield Statute

This outline has several objectives: (1) providing the reader with an overview of the historical development of the rape-shield doctrine in Arizona; (2) summarizing how Arizona courts have resolved certain federal and state constitutional challenges to the preclusion of evidence pursuant to A.R.S. § 13-1421 and its common-law antecedents; (3) identifying the current state of the law; and (4) offering practical advice about how to minimize the likelihood of reversal when evidence is precluded pursuant to Arizona's rape-shield statute for not falling within one of the five exceptions set forth in Section 13-1421(A)(1)-(5).

Historical development.

1. Several years before promulgating the Arizona Rules of Evidence, the Arizona Supreme Court "affirmatively established a rape shield that prohibits admission of a victim's sexual history as evidence of bad character or consent except in highly particularized situations." *State v. Lujan*, 192 Ariz. 448, 452, ¶ 14, 967 P.2d 123, 127 (1998) (citing *Pope v. Superior Court*, 113 Ariz. 22, 28–29, 545 P.2d 946, 952–53 (1976)).

2. The event that triggered the adoption of the rape-shield doctrine in our state was the necessity of repudiating the following rule of law, which had allowed rape defendants to offer evidence of the victim's prior sexual activity in order to establish consent to the charged act of intercourse: "If consent be a defense to the charge, then certainly any evidence which reasonably tends to show consent is relevant and material, and common experience teaches us that the woman who has once departed from the paths of virtue is far more apt to consent to another lapse than is the one who has never stepped aside from that path." *State v. Wood*, 59 Ariz. 48, 52, 122 P.2d 416, 418 (1942) (sanctioning the admission of reputation evidence and specific acts to prove the victim's lack of chastity). *Accord State v. Oliver*, 158 Ariz. 22, 26, 760 P.2d 1171, 1175 (1988) ("Prior to this court's ruling in *Pope*, evidence concerning the prior sexual history of a victim was admissible where the accused raised consent as a defense in a prosecution for forcible rape. [Citations omitted.] Arizona courts tolerated the introduction of such evidence under the misguided assumption that 'common experience teaches us that the woman who has once departed from the paths of virtue is far more apt to consent to another lapse than is the one who has never stepped aside from that path.'") (quoting *Wood*, 59 Ariz. at 52, 122 P.2d at 418).

3. Rejection of this longstanding rule prompted the Arizona Supreme Court to make two forceful declarations:

> **A. "The law does not and should not recognize any necessary connection between a witness' veracity and her sexual immorality."** *Pope v. Superior Court*, 113 Ariz. 22, 26, 545 P.2d 946, 950 (1976) (collecting cases). *Accord State v. Oliver*, 158 Ariz. 21, 31, 760 P.2d 1171, 1181 (1988) ("Having already extended *Pope* to child molestation cases, it implicitly follows that

evidence of a minor victim's prior sexual history is inadmissible to impeach the credibility of the victim in a molestation case. Moreover, under [Arizona] Rule [of Evidence] 608(b), prior bad acts of a witness may not be inquired into unless the acts are probative of truthfulness or untruthfulness. Simply stated, evidence of sexual misconduct is not probative of truthfulness.").

B. "Reference to prior unchaste acts of the complaining witness injects collateral issues into the case which … divert the jury's attention from the real issues, the guilt or innocence of the accused. … A prosecutrix in a forcible rape prosecution should not be expected to come prepared to defend every incident of (her) past life. … In accordance with the general rule, the doing of one wrongful act shall (not) be deemed evidence to prove the doing of another of a similar character, which has no connection with the first. … The fact that a woman consented to sexual intercourse on one occasion is not substantial evidence that she consented on another, but in fact may indicate the contrary." *Pope v. Superior Court*, 113 Ariz. 22, 28, 545 P.2d 946, 952 (1976) (citations omitted; collecting cases).

4. Recognizing that rape victims merit protection from irrelevant forays into their sexual pasts, the Arizona Supreme Court held, "[C]haracter evidence concerning unchastity is inadmissible to impeach the credibility of a prosecutrix in a forcible rape prosecution. Evidence tending to show her unchaste reputation or prior unchaste acts is also inadmissible for substantive purposes on the issue of consent, subject to the limited exceptions discussed [earlier in its opinion]." *Pope v. Superior Court*, 113 Ariz. 22, 29, 545 P.2d 946, 953 (1976). *See also State v. Gilfillan*, 196 Ariz. 396, 401 n.3, 998 P.2d 1069, 1074 n.3 (App.2000). ("Recognizing the specious connection between a witness' veracity and her sexual immorality [citation omitted], the court in *Pope* held that evidence concerning a rape victim's alleged lack of chastity is generally inadmissible unless, in certain limited circumstances, the evidence of prior acts has sufficient probative value to outweigh its inflammatory effect on her credibility.") (citing *Pope*, 113 Ariz. at 26, 29, 545 P.2d at 950, 953).

5. The exceptions to which the Arizona Supreme Court had alluded in the prior passage are set forth below:

We recognize there are certain limited situations where evidence of prior unchaste acts has sufficient probative value to outweigh its inflammatory effect and require admission. These would include evidence of prior consensual sexual intercourse with the defendant [the common-law forerunner to A.R.S. § 13-1421(A)(1)] or testimony which directly refutes physical or scientific evidence, such as the victim's alleged loss of virginity, the origin of semen, disease or pregnancy [the common-law predecessor to A.R.S. § 13-1421(A)(2)]. [Citations omitted.]

… As with evidence concerning prior acts, this rule of exclusion must be subject to certain exceptions, such as where the prosecution offers evidence of

> the complaining witness' chastity [the common-law origin for A.R.S. § 13-1421(A)(4)]. [Citation omitted.] Reputation evidence concerning unchastity may also be relevant in an attempted rape prosecution, where the subjective intent of the assailant is an element of the crime [an exception ***not*** included among A.R.S. § 13-1421(A)(1)-(5)'s exceptions].

Pope v. Superior Court, 113 Ariz. 22, 29, 545 P.2d 946, 953 (1976). *Accord State v. Lujan*, 192 Ariz. 448, 452, ¶ 14, 967 P.2d 123, 127 (1998) ("But *Pope* allows a victim's prior sexual conduct to be admitted under some circumstances, such as when the alleged victim's previous acts with the accused may show consent, when the prosecution has opened the door by asserting the victim's chaste nature, or when 'the subjective intent of the assailant is an element of the crime.'") (quoting *Pope*, 113 Ariz. 29, 545 P.2d at 953); *State v. Oliver*, 158 Ariz. 22, 27, 760 P.2d 1171, 1076 (1988) ("In [*Pope*], we enumerated several of these exceptions, including 'evidence of prior consensual sexual intercourse with the defendant or testimony which directly refutes physical or scientific evidence, such as the [victim's] alleged loss of virginity, the origin of semen, disease or pregnancy.'") (quoting *Pope*, 113 Ariz. at 29, 545 P.2d at 953)).

6. The Arizona Supreme Court indicated in *Pope* that the aforementioned list of exceptions to the rape shield was *not* exhaustive, but illustrative, in scope:

> We envision that *there may be exceptions other than those noted above to the inadmissibility of evidence concerning the complaining witness' unchastity*. Where, for instance, the defendant alleges the prosecutrix actually consented to an act of prostitution, the accused should be permitted to present evidence of her reputation as a prostitute and her prior acts of prostitution to support such a defense [a rationale ***not*** among A.R.S. § 13-1421(A)(1)-(5)'s listed exceptions]. In addition, evidence concerning unchastity would be admissible in conjunction with an effort by the defense to show that the complaining witness has made unsubstantiated charges of rape in the past [the common-law source of A.R.S. § 13-1421(A)(5)].

Pope v. Superior Court, 113 Ariz. 22, 29, 545 P.2d 946, 953 (1976) (emphasis added). *Accord State v. Oliver*, 158 Ariz. 22, 27, 760 P.2d 1171, 1076 (1988) ("Moreover, we envisioned [in *Pope*] other exceptions to the general rule, for instance, where a defendant alleges the victim actually consented to an act of prostitution, or in conjunction with an effort by the defense to show that the victim had made unsubstantiated charges of rape in the past. … Arizona courts have implicitly held that *Pope's* list of exceptions is not exhaustive. [Citations and parenthetical comments omitted.] Before deciding whether to carve out another exception to Arizona's rape shield, we note that we reached our decision in *Pope* prior to the September 1, 1977, promulgation of the Arizona Rules of Evidence.").

…

7. Besides adopting the rape-shield doctrine, *Pope* also decreed the following procedural regime for defendants to follow in order to introduce evidence of the victim's sexual history—one that the Legislature later codified in A.R.S. § 13-1421(B):

> In these and other instances in which the evidence concerning unchastity is alleged to be sufficiently probative to compel its admission despite its inflammatory effect, a hearing should be held by the court outside the presence of the jury prior to the presentation of the evidence. This hearing should be preceded by a written motion or offer of proof on the record, made without the jury's knowledge, which should include the matters sought to be proved by either cross-examination of the complaining witness or by other witnesses. Either of these should make reference to specific records or documents which may be relied upon. If the defendant alleges that profferred evidence falls into one of the above exceptions, the trial court should allow its admission if it is not too remote and appears credible.

Pope v. Superior Court, 113 Ariz. 22, 29, 545 P.2d 946, 953 (1976). Arizona courts thereafter upheld the preclusion of defense evidence regarding the victim's sexual history in cases wherein the defendant had ignored this notice-and-hearing requirement. *See State v. Reinhold*, 123 Ariz. 50, 54, 597 P.2d 532, 536 (1979); *State v. Grice*, 123 Ariz. 66, 70, 597 P.2d 548, 552 (App.1979); *State v. Quinn*, 121 Ariz. 582, 584, 592 P.2d 778, 780 (App.1979).

8. Twelve years after *Pope*, the Arizona Supreme Court extended *rape-shield protection* beyond sexual-assault cases to cover children who were victims of crimes:

> A number of other jurisdictions have extended their rape shield laws to cases involving child molestation victims. *State v. Rossignol*, 490 A.2d 673 (Me.1985); *Commonwealth v. Baldwin*, 502 A.2d 253 (Pa.Super.Ct.1985), *disapproved on other grounds*, *Commonwealth v. Davis*, 541 A.2d 315 (Pa.1988); *State v. Freeman*, 447 So.2d 600 (La.Ct.App.1984); *Fields v. State*, 281 Ark. 43, 661 S.W.2d 359 (1983); *State v. Peyatt*, 315 S.E.2d 574 (W.Va.1983); *Lewis v. State*, 451 N.E.2d 50 (Ind.1983); *People v. Arenda*, 416 Mich. 1, 330 N.W.2d 814 (1982); *State v. Padilla*, 110 Wis.2d 414, 329 N.W.2d 263 (App.1982); *State v. Howard*, 121 N.H. 53, 426 A.2d 457 (1981). In fact, the Arizona Court of Appeals has applied *Pope* to a case involving a minor victimized by sex crimes. *State v. Lindsey*, 149 Ariz. 493, 497–98, 720 P.2d 94, 98–99 (App.1985), *aff'd in part, vacated in part on other grounds*, 149 Ariz. 472, 720 P.2d 73 (1986). In *Lindsey*, the court cited *Pope* to support its holding that, absent evidence that the victim had intercourse with anyone except the defendant during the time of conception, it was proper to preclude evidence that the victim allegedly had intercourse with others several weeks or months after her pregnancy, or long before. *Id*. at 498, 720 P.2d at 99.

> Two of the policies underpinning *Pope*—that requiring sex crime victims to defend every incident in their pasts will discourage prosecution and that the introduction of sexual histories might confuse the jury—are just as valid in a child molestation case as in a rape prosecution. In fact, child molestation victims may be even more adversely affected by unwarranted and unreasonable inquiry into largely collateral and irrelevant evidence than victims in rape cases. *People v. Arenda*, 416 Mich. 1, 13, 330 N.W.2d 814, 818 (1982). Accordingly, we now extend Arizona's rape shield to child molestation cases.

State v. Oliver, 158 Ariz. 22, 26-27, 760 P.2d 1071, 1075-76 (1988).

9. After extending *Pope* to protect child sex-crime victims, the Arizona Supreme Court proceeded to the question of whether it should recognize an exception to the rape-shield statute that *Pope* had <u>not</u> enumerated, namely one for sexual-history evidence showing that "it was possible for the victims to have the knowledge of sexual matters necessary to fabricate a molestation charge." *State v. Oliver*, 158 Ariz. 22, 27, 760 P.2d 1071, 1076 (1988). The Court ultimately answered this question in the *affirmative*, based upon the following reasoning:

> **A. The threshold question for determining the admissibility of the proffered defense evidence must be resolved by applying Arizona Rules of Evidence 401, 402, and 403 to the proffered defense evidence. The Court elaborated:**
>
> Before deciding whether to carve out another exception to Arizona's rape shield, we note that we reached our decision in *Pope* prior to the September 1, 1977, promulgation of the Arizona Rules of Evidence.
>
> Under Rules 402 and 403, in the absence of a constitutional provision or a specific statute or rule to the contrary, all relevant evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay. Ariz.R.Evid., 17A A.R.S. (Supp.1987); *State v. Hensley*, 142 Ariz. 598, 691 P.2d 689 (1984); *State v. Jeffers*, 135 Ariz. 404, 661 P.2d 1105, *cert. denied*, 464 U.S. 865, 104 S.Ct. 199, 78 L.Ed.2d 174 (1983); *Fridena v. Evans*, 127 Ariz. 516, 622 P.2d 463 (1980). Before reaching Rule 403, though, it is necessary to analyze the proffered evidence under Rule 401 to ascertain whether it is relevant. *State v. Fisher*, 141 Ariz. 227, 245, 686 P.2d 750, 768, *cert. denied*, 469 U.S. 1066, 105 S.Ct. 548, 83 L.Ed.2d 436 (1984). If evidence has no probative value, it is inadmissible under Rule 401, without even reaching Rule 403.FN2 *State v. Meraz*, 152 Ariz. 588, 590–91, 734 P.2d 73, 75–76 (1987) (Feldman, V.C.J., concurring); *Banks v. Crowner*, 694 P.2d 101 (Wyo.1985).
>
> FN2. Some courts have excluded evidence, not necessarily precluded by rape shield laws, because they found the evidence to be irrelevant under Rule 401. *See, e.g.*, *State v. Clarke*, 343 N.W.2d 158, 162

(Iowa 1984); G. JOSEPH & S. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES, ch.11, p. 4 (1987).

For Rule 401 purposes, evidence is relevant if it has any tendency to make the existence of any fact that is of consequence more or less probable than it would be without the evidence. *State v. Adamson*, 136 Ariz. 250, 259, 665 P.2d 972, 981, cert. denied, 464 U.S. 865, 104 S.Ct. 204, 78 L.Ed.2d 178 (1983); *State v. Moss*, 119 Ariz. 4, 5, 579 P.2d 42, 43 (1978). This standard of relevance is not particularly high. *See, e.g., United States v. Southland Corp.*, 760 F.2d 1366, 1375 (2nd Cir.), *cert. denied*, 474 U.S. 825, 106 S.Ct. 82, 88 L.Ed.2d 67 (1985); *Carter v. Hewitt*, 617 F.2d 961, 966 (3rd Cir. 1980).

State v. Oliver, 158 Ariz. 22, 27-28, 760 P.2d 1071, 1076-77 (1988).

B. Applying Rules 401 and 402 to the category of sexual-history evidence at issue, the Arizona Supreme Court agreed that evidence of the victim's exposure to sexual activity is relevant to the defense that the victim possessed sufficient sexual knowledge to fabricate child-molestation allegations against the defendant. Thus, the proffered evidence was admissible unless barred by Rule 403:

We believe that if an accused raises the defense of fabrication, and if the minor victim is of such tender years that a jury might infer that the only way the victim could testify in detail about the alleged molestation is because the defendant had in fact sexually abused the victim, then evidence of the victim's prior sexual history is relevant to rebut such an inference. *Commonwealth v. Ruffen*, 399 Mass. 811, 507 N.E.2d 684 (1987); *State v. Carver*, 37 Wash.App. 122, 678 P.2d 842 (1984). Exclusion of this evidence would unfairly curtail a defendant's ability to present a logical explanation for a victim's testimony. *Ruffen*, 399 Mass. at 815, 507 N.E.2d at 687–88; *Carver*, 37 Wash.App. at 125, 678 P.2d at 844.

Because we find that evidence of a minor victim's prior sexual history is relevant in this limited circumstance, we must discuss generally the Rule 403 balancing courts undertake to determine whether the probative value of such evidence is outweighed by its capacity for unfair prejudice. *Pope*, 113 Ariz. at 29, 545 P.2d at 953; Rule 403, Ariz.R.Evid., 17A A.R.S. (Supp.1987).

State v. Oliver, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (1988).

C. The Arizona Supreme Court promulgated the following standard for trial judges to apply in fabrication cases—one that had two separate steps, but which could expand to include consideration of *other* factors in appropriate cases:

> Other jurisdictions have found evidence of a minor victim's prior sexual history relevant to rebut the inference that the victim would not know about such sexual acts unless the defendant had sexually abused the victim. *Ruffen*, 399 Mass. at 815, 507 N.E.2d at 687–88; *Carver*, 37 Wash.App. at 125, 678 P.2d at 844 (1984); *State v. Padilla*, 110 Wis.2d 414, 329 N.W.2d 263 (App.1982). Before admitting such evidence, though, some courts employ a two-pronged analysis to determine whether the evidence's probative value is outweighed by the danger of unfair prejudice. Under the first prong, the defendant must show, in camera, that the victim previously had been exposed to a sexual act. *Ruffen*, 399 Mass. at 815, 507 N.E.2d at 687; *Padilla*, 110 Wis.2d at 429, 329 N.W.2d at 271. Under the second prong, the defendant must establish that the prior sexual act was sufficiently similar to the present sexual act to give the victim the experience and ability to contrive or imagine the molestation charge. *Ruffen*, 399 Mass. at 815, 507 N.E.2d at 687; *Padilla*, 110 Wis.2d at 430, 329 N.W.2d at 271; *see also State v. Howard*, 121 N.H. 53, 426 A.2d 457 (1981).
>
> We believe that this two-pronged approach has merit, and we encourage Arizona courts to utilize this analysis when determining whether to admit evidence of a young child's prior sexual history. [FN3] Accordingly, if, in the discretion of the trial court, the defendant's offer of proof does not establish either that a victim had prior sexual experience, or that this prior sexual experience provided the victim with the ability to fabricate in the present case, then the trial court should exclude the evidence because its probative value is substantially outweighed by the danger of unfair prejudice.
>
> FN3. *Although we have identified two factors to be considered by a trial court when balancing the probative value of evidence against the danger of unfair prejudice, we do not imply that these factors must be applied mechanically, or, for that matter, that they are the only factors that a court might consider*.

State v. Oliver, 158 Ariz. 22, 28-29, & n.3 760 P.2d 1071, 1077-78 & n.3 (1988) (emphasis added). *Accord State v. Lujan*, 192 Ariz. 448, 453, ¶ 15, 967 P.2d 123, 128 (1998) ("Following other courts that had adopted this exception, *Oliver* required a showing that the victim had been previously exposed to a sexual act sufficiently similar to the act presently charged to give the victim the ability to imagine or contrive the later accusation. [Citation omitted.] The court did not adopt a rigid test and therefore did not 'imply that these factors must be applied mechanically, or ... that they are the *only factors that a court might consider*.'") (quoting *Oliver*, 158 Ariz. at 28 n.3, 760 P.2d at 1077 n.3) (emphasis in original).

> **D. Application of this standard to *Oliver,* one of the two consolidated cases for which the Arizona Supreme Court granted review.** In this matter, the defendant sought to establish his victim-daughter's "independent knowledge of the physiological aspects of the alleged molestation" by offering evidence that (1) a cousin had vaginal intercourse with the victim 18 months earlier; (2) another man

had fondled and attempted vaginal intercourse with her on a different occasion; and (3) the victim had witnessed her mother having sex with a boyfriend. 158 Ariz. at 29, 760 P.2d at 1078. The Arizona Supreme Court recognized that the victim's knowledge of ejaculation was relevant to his defense that she had fabricated her allegations against him, but approved of the trial court's ruling allowing the defendant to establish such knowledge at trial without delving into the specifics of the prior episodes:

> The trial court ruled that, as a general proposition, *Pope* and *Lindsey* prohibit the admission of a victim's prior sexual history. [Footnoted omitted.] However, the trial court also found that Oliver was entitled to inform the jury that Jackie had independent knowledge of sexual matters; particularly, the trial court believed it was important that the jury understood that, prior to the alleged molestation, Jackie had knowledge of seminal fluids and ejaculation. To accomplish this goal, the trial court permitted either the defendant or the State, through leading questions, to draw forth from Jackie an admission that she had independent knowledge of ejaculation from experiences with someone other than Oliver.
>
> Shortly before opening statements, the State and Oliver agreed to the form of the questions to be put to Jackie concerning her prior knowledge of ejaculation and seminal fluids. On direct examination, the State asked Jackie the following question:
>
> > Okay. Now, before this happened [the Oliver molestation] you knew that when people had sex that white stuff would sometimes come out of men's penises?
> >
> > Jackie answered yes to the question.
>
> We believe that the trial court's actions are in keeping with the spirit of the rule we have articulated today. The trial court listened to an offer of proof [footnote omitted] and, presumably, after determining that a sufficiently similar prior molestation occurred, admitted evidence of Jackie's independent knowledge of ejaculation and seminal fluids. Moreover, we approve of the trial court's decision to restrict how the parties could elicit from Jackie evidence of her sexual knowledge. Although Oliver was entitled to present evidence that Jackie was familiar with seminal fluid and ejaculation, the trial court had a duty to protect Jackie "from harassment or undue embarrassment." Rule 611(a)(3), Ariz.R.Evid., 17A A.R.S. (Supp.1987); *United States v. Colyer*, 571 F.2d 941, 947, n.7 (5th Cir. 1978). Whenever possible, we believe the trial court should endeavor to protect minor victims from unwarranted and unreasonably intrusive cross-examination by requiring counsel to demonstrate, if possible, independent knowledge of sexual matters without

> producing evidence of the details of the victim's previous sexual experience. *See generally Arenda*, 416 Mich. at 13, 330 N.W.2d at 818.

State v. Oliver, 158 Ariz. 22, 29-30, 760 P.2d 1071, 1078-79 (1988).

E. Application of this standard to *Cordone*, the companion case to *Oliver*, in which the defendant was charged with oral sexual conduct with two different boys. The defendant sought to support his fabrication defense with evidence showing that: (1) Boy #1 claimed that, at the age of 11, he had engaged in vaginal intercourse with as many as four girls his own age; (2) Boy #1 also claimed that a girl performed oral sex on him; and (3) Boy #1 and Boy #2 had exchanged "blow jobs" and been sexually intimate. The Arizona Supreme Court upheld the trial court's preclusion of this evidence because of its low probative value in establishing that the defendant's sexual abuse was the sole reason the victims were able to describe the charged acts during trial, especially in light of the non-explicit nature of the victims' testimony relating the charged events and their ages at trial:

> Nevertheless, under our ruling today, the trial court could properly preclude Cordone from introducing evidence of the victims' prior sexual histories only if the evidence were either irrelevant or more prejudicial than probative. Such being the case, we must consider whether the precluded evidence was admissible under any of the four purposes Cordone suggests.
>
> Cordone maintains that he should have been allowed to introduce evidence of the victims' prior sexual histories to rebut the inference that the only reason the victims could describe the molestation was because it did, in fact, occur. At the time of trial, John and Jeremy were 16 and 15 years old, respectively. Additionally, the City of Tucson police officer, Joyce Lingel, who initially investigated the molestation charge, indicated that the victims were 13 and 12 years old when she first interviewed them concerning the molestation. Moreover, the testimony of both victims was not particularly explicit. [FN6: At its most graphic, the testimony of the victims merely indicated that Cordone had placed his mouth on their penises.] Given the age of the victims and the rather unexplicit nature of their testimony, we find it unlikely that a jury would infer that the victims could only describe the molestation because Cordone had, in fact, molested them.

State v. Oliver, 158 Ariz. 22, 30-31, 760 P.2d 1071, 1079-80 (1988).

…
…

10. The Arizona Supreme Court then addressed and *rejected* three additional theories of admissibility that the defendant in the *Cordone* matter had offered.

A. Rejecting the defendant's claim that the victims' prior sexual history was probative of their truthfulness, the Arizona Supreme Court reaffirmed and extended its prior holding in *Pope*:

> Cordone also asserts that he should have been able to introduce evidence of the victims' prior sexual histories to attack their credibility. In Pope, we held that character evidence concerning unchastity is inadmissible to impeach the credibility of a forcible rape victim. *Pope*, 113 Ariz. at 29, 545 P.2d at 953. Having already extended Pope to child molestation cases, it implicitly follows that evidence of a minor victim's prior sexual history is inadmissible to impeach the credibility of the victim in a molestation case. Moreover, under 608(b), Ariz.R.Evid., 17A A.R.S. (Supp.1987), prior bad acts of a witness may not be inquired into unless the acts are probative of truthfulness or untruthfulness. Simply stated, evidence of sexual misconduct is not probative of truthfulness. *Pope*, 113 Ariz. at 28–29, 545 P.2d at 952–53; M. UDALL & J. LIVERMORE, ARIZONA LAW OF EVIDENCE § 48 (2d ed. 1982).

State v. Oliver, 158 Ariz. 22, 31, 760 P.2d 1071, 1080 (1988).

B. Rejecting the defendant's argument that evidence of the victims' sexual history was relevant to prove their tendency to exaggerate, the Arizona Supreme Court implicitly recognized the potential that evidence of braggadocio could be admitted under Arizona Rule of Evidence 608(b), but found preclusion of this evidence to constitute a proper exercise of the trial judge's considerable discretion:

> Cordone next maintains that he should have been permitted to introduce evidence of John's boasting about his sexual exploits with young girls to show that John has a tendency to exaggerate. [FN7: In this vein, Cordone also wanted to introduce evidence that John bragged that he was capable of urinating with an erection.] However, prior demonstrations of braggadocio and mendacity are not automatically admitted under Rule 608(b). The utility of such evidence must be weighed against the possibility of prejudice under Rule 403. *State v. Woods*, 141 Ariz. 446, 450, 687 P.2d 1201, 1205 (1984). Where past acts of untruthfulness are wholly unrelated to the matter in issue, then the evidence may be, in the discretion of the court, properly excluded under Rules 608(b) and 403. *State v. Cook*, 151 Ariz. 205, 206, 726 P.2d 621, 622 (App.1986) (exclusion of statement that sexual assault victim made to doctor, that she had not had sexual conduct with a man for two or three years, and later statement made to the doctor that she had been living with male friend for six or seven months prior to assault incident, was proper,

where falsehood to doctor had nothing to do with doctor's examination, and was wholly unrelated to issues in case).

> We fail to see how an 11–year-old boy's bragging about his sexual conquests with several young girls is particularly probative of his character for truthfulness. Moreover, this evidence is unrelated to the matter in issue. Additionally, John's exaggerated claims are somewhat remote in time from his trial testimony. Finally, the introduction of such evidence might lure counsel into matters precluded by *Pope*. *Cook*, 151 Ariz. at 206, 726 P.2d at 622. For all the above reasons, we find that the trial court could have properly excluded the evidence under Rules 608(b) and 403.

State v. Oliver, 158 Ariz. 22, 31, 760 P.2d 1071, 1080 (1988).

C. Finally turning to the defendant's argument that the victims' sexual histories were admissible to prove that they had a motive to falsely accuse him of the charged offenses, the Arizona Supreme Court essentially found the defendant's theory of admissibility so "far-fetched" that it was not logically relevant and therefore could not constitute a factual predicate from which a motive to fabricate could be reasonably inferred:

> Finally, Cordone argues that the victims' prior sexual histories were relevant to establish that John and Jeremy had a motive for falsely accusing him. In essence, Cordone argues that John had a retaliatory motive for testifying against Cordone because John was humiliated when he was observed masturbating in Cordone's trailer. At trial, however, John testified that he did not feel any particular animosity toward Cordone when he called Detective Lingel, and that he called the police because he realized Cordone's actions were wrong. Additionally, John indicated that he wanted to get help for Cordone. Finally, it is far-fetched to assume that a teenage boy who is embarrassed when caught masturbating will retaliate by drawing attention to the fact that he has been a party to a homosexual relationship. In Arizona, evidence of prior sexual history is inadmissible on the issue of motive unless the record clearly establishes a factual predicate from which motive can be inferred. *State v. Holley*, 123 Ariz. 382, 384, 599 P.2d 835, 837 (App.), *cert. denied*, 444 U.S. 970, 100 S.Ct. 464, 62 L.Ed.2d 386 (1979). We find that such a factual predicate is lacking in the record before this court.

State v. Oliver, 158 Ariz. 22, 31-32, 760 P.2d 1071, 1080-81 (1988).

N.B. This holding in *Oliver* is part and parcel of a long line of authority allowing trial courts to preclude sexual-history evidence having little or no tendency to prove the fact the defendant allegedly seeks to prove. *See, e.g., United States v. Hitt*, 473 F.3d 146, 156-57 (5th Cir. 2006) ("Hitt sought to impeach AV's credibility by

introducing prejudicial sex act evidence that is only marginally relevant to AV's credibility. That AV was previously sexually abused by Reynolds and discussed it with authorities only after being approached by authorities about the matter has little bearing on whether AV was truthful in his allegations that Hitt and Causey sexually abused him. Similarly, that Reynolds was willing to testify that he only engaged in oral sex with AV is only marginally relevant to whether AV was truthful in his sexual abuse allegations respecting Hitt and Causey."); *State v. Rodriguez*, 186 Ariz. 240, 251, 921 P.2d 643, 654 (1996) (murder defendant was properly precluded from presenting evidence of victim's prior sexual history, as evidence of her promiscuity and sexually-inviting behavior with other men was absolutely irrelevant to the defense that someone else killed her); *State v. Lindsey*, 149 Ariz. 493, 498–99, 720 P.2d 94, 99–100 (App.1985), *aff'd in part and vacated in part*, 149 Ariz. 472, 720 P.2d 73 (1985) (in a prosecution for incest and sexual exploitation of a minor, evidence that molestation victim had intercourse with others several weeks or months before and after her pregnancy was inadmissible for the purpose of demonstrating that defendant was not the father, absent additional evidence that the victim had intercourse with other men at the time of conception); *State v. Garcia*, 138 Ariz. 211, 216, 673 P.2d 955, 960 (App.1983) (precluding, in a rape prosecution, evidence of the victim's unchaste sexual conduct short of intercourse because it did not rebut the state's claim that she had been a virgin before the sexual assault); *State v. Holley*, 123 Ariz. 382, 384–85, 599 P.2d 835, 837–38 (App.1979) (rejecting as irrational the defendant's theory that victims fabricated their rape allegations against him because they "were attempting to show that they were reliable persons who would perform carnival work without diverting the attention of their fellow attorneys," because the victims never testified that they "were interested in seeking re-employment with the Capel Brothers Carnival").

11. *State v. Lujan*, 192 Ariz. 448, 967 P.2d 123 (1998), held that *Pope's* rape-shield doctrine did not authorize the trial court to preclude evidence showing that two other men had subjected the alleged child-molestation victim to severe sexual abuse (including anal, oral, and vaginal intercourse), as well as defense expert testimony that children who suffer severe sexual abuse "might develop 'hypersensitivity' and thus misperceive the nature of any physical touch by another adult male." *Id.* at 450-51, ¶¶ 3-6, 967 P.2d at 125-26. The State alleged that the defendant had manual contact with the victim's vagina while they were in a swimming pool together; the defendant, however, denied any sexual contact and claimed that he had only dunked her by her ankles after she had jumped on him. *Id.* at 450-51, ¶¶ 2, 8, 967 P.2d at 125-26. The proffered defense evidence included: "(1) evidence of another's conviction for sexual abuse of [the victim], and (2) expert testimony to substantiate his theory of [the victim's] possible misperception." *Id.* at 451, ¶ 8, 967 P.2d at 126. **The Arizona Supreme Court held that the preclusion of this evidence was reversible error, based on the following reasoning:**

> **A. *State v. Moran*, 151 Ariz. 378, 728 P.2d 248 (1986), and *State v. Lindsey*, 149 Ariz. 372, 720 P.2d 73 (1986), rendered the expert testimony admissible because it would provide the jury with information helpful in assessing the credibility of the victim's testimony:** "Just as the prosecution in

Moran could use expert testimony about the behavioral characteristics of sexually abused children to explain the inconsistencies in a child's statements, when appropriate under the facts of a particular case, the defense may use such testimony to show a child's possible misperceptions. Thus, testimony providing the jury with an alternate explanation of the basis for Chelsie's allegations was admissible to assist the jury in evaluating her testimony." *State v. Lujan*, 192 Ariz. 448, 452, ¶¶ 11-12, 967 P.2d 123, 127 (1998).

B. The trial court's Rule 403 balancing was incorrect: "The jurors were not likely to be prejudiced against nine-year-old [victim] by hearing that she had been terribly abused by another. Suppressing the evidence, however, caused extreme prejudice to Lujan because absent the expert testimony and the underlying evidence of prior abuse, he was unable to present his defense. Thus the judge's ruling that the evidence was more prejudicial than probative is unsupported." *State v. Lujan*, 192 Ariz. 448, 452, ¶ 13, 967 P.2d 123, 127 (1998).

C. Given these two findings, the Arizona Supreme Court indicated that reversal was warranted unless the proffered evidence was barred by the rape-shield doctrine. Thus, the Court proceeded to determine its admissibility under the three prominent rape-shield cases—*Pope*, *Oliver*, and *Castro*. *State v. Lujan*, 192 Ariz. 448, 452-54, ¶¶ 13-19, 967 P.2d 123, 127-29 (1998).

D. *Pope* did not bar the proffered evidence because: (1) that decision created an exception when "the subjective intent of the assailant is an element of the crime," *State v. Lujan*, 192 Ariz. 448, 452, ¶ 14, 967 P.2d 123, 127 (1998) (quoting *Pope v. Superior Court*, 113 Ariz. 22, 29, 545 P.2d 946, 953 (1976)); and (2) the phrase "knowingly molests" in the former version of A.R.S. § 13-1410(A) required proof that "the defendant be motivated by a sexual interest," *Lujan*, 192 Ariz. at 451-52, ¶¶ 7, 14, 967 P.2d at 126-27.

> N.B. The Legislature subsequently amended the version of A.R.S. § 13-1410 that *Lujan* referenced, the consequence of which is that sexual motivation is *not* an element of child molestation, but the absence of sexual motivation is an affirmative defense under A.R.S. § 13-1407(E). *See State v. Simpson*, 217 Ariz. 326, 328-30, ¶¶ 17-23, 173 P.3d 1027, 1029-31 (App.2007).

E. *Oliver* posed no obstacle to the evidence proffered in *Lujan* because that decision had fashioned a non-exclusive standard for admitting evidence showing that a child-molestation victim could have obtained sexually explicit knowledge from sources other than the defendant's sexual abuse:

> Following other courts that had adopted this exception, *Oliver* required a showing that the victim had been previously exposed to a sexual act sufficiently similar to the act presently charged to give the victim the ability to imagine or contrive the later accusation. [*State v.*

> *Oliver*, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (1988).] The court did not adopt a rigid test and therefore did not "imply that these factors must be applied mechanically, or ... *that they are the only factors that a court might consider*." *Id.* at 28 n.3, 760 P.2d at 1077 n.3.
>
> Thus, under *Oliver* a defendant can offer incidents of the child's prior abuse to show motive, propensity, or ability to imagine or fabricate when the evidence is "introduced for purposes other than to impugn or cast doubt on a victim's moral character." *Id*. at 27, 760 P.2d at 1076. The evidence in the present case was not offered to impugn or cast doubt on Chelsie's moral character; it was intended solely to help explain the subconscious mental processes that might have affected her perception, the account she gave to the police, or her subsequent testimony.

State v. Lujan, 192 Ariz. 448, 453, ¶¶ 15-16, 967 P.2d 123, 128 (1998) (emphasis in original).

F. Finally, the Arizona Supreme Court ruled that *Castro* authorized admitting the evidence at issue in *Lujan* because all four prerequisites of admissibility were satisfied:

> In *State v. Castro*, the court of appeals held a rape victim's sexual history is admissible to show a victim's motive in bringing charges if the defendant has established a factual predicate connecting the victim's sexual history with the defense theory of motive. 163 Ariz. 465, 468–71, 788 P.2d 1216, 1219–21 (App.1989) (recognizing defendant's Sixth Amendment right to explore victim's motive as necessary element of presenting the defense). [Footnote omitted.] As the *Castro* court stated, determining admissibility of the victim's prior sexual conduct "requires critical scrutiny of (1) the validity of defendant's probative theory; (2) the evidence defendant seeks to admit, as detailed by offer of proof; (3) the tendency of the evidence to support defendant's probative theory; and (4) the inflammatory or diversionary risks of placing such evidence before the jury." *Id*. at 469, 788 P.2d at 1220.
>
> The evidence of Chelsie's prior abuse is admissible under *Castro*. First, Lujan's claim that Chelsie's previous sexual abuse resulted in misperception of physical contact is at least an arguably valid probative theory. Also, Lujan laid a foundation connecting the factual predicate of abuse with the defense legal theory. Moreover, Lujan made a sufficient offer of proof explaining why Chelsie might have incorrectly accused him of an inappropriate touching even if such touching did not occur. Finally, no prejudice, let alone unfair prejudice, would result from allowing the jury to hear evidence of Chelsie's prior abuse. Prior abuse of such a young victim does not stigmatize, impugn moral character, or attack chastity. Indeed, defense counsel disavowed any attempt to impeach Chelsie,

saying he sought only to inform the jury of the factors that might help explain Chelsie's allegations. R.T., Aug. 1, 1994, at 23–24.

State v. Lujan, 192 Ariz. 448, 453, ¶¶ 17-18, 967 P.2d 123, 128 (1998).

G. Significantly, the Arizona Supreme Court concluded its opinion by approvingly quoting the following passage from *Castro*, ostensibly to reinforce the notion that the list of recognized exceptions to *Pope's* rape-shield doctrine was *not* exhaustive, but illustrative:

> *Pope* does not allow a victim's sexual history to be used for character assassination, to attack truthfulness, or to establish evidence of willingness to engage in sexual relations on the theory that previous intercourse implies consent to all future acts. We know from *Oliver* that *Pope* is applicable to both rape and child molestation cases. But as the court of appeals has stated:
>
> > To conclude that *Pope* is applicable ... is not the end of analysis where sexual history is concerned. It should not have taken until Pope in 1976 for the law to determine that a woman's history of sexual relations is probative neither of her veracity as a witness nor of her consent to sexual relations in a given instance. *There may, however, be other probative purposes than these, and Pope does not proscribe them all.*
>
> *Castro*, 163 Ariz. at 469, 788 P.2d at 1220. This case presents an instance in which such evidence was probative.

State v. Lujan, 192 Ariz. 448, 453-54, ¶¶ 17-18, 967 P.2d 123, 128-29 (1998) (emphasis added).

12. The next chapter in the rape-shield doctrine's history in Arizona started in 1998, when the Legislature enacted A.R.S. § 13-1421. "Like the majority of states, Arizona has enacted a statute intended to protect victims of rape from being exposed at trial to harassing or irrelevant questions concerning any past sexual behavior." *State v. Gilfillan*, 196 Ariz. 396, 400-01, ¶ 15 & n.2, 998 P.2d 1069, 1073-74 & n.2 (App.2000) (citing authorities in footnote). "The Arizona Rape Shield Law seemingly codifies the rule enunciated in *State ex rel. Pope v. Superior Court in and for Mohave County*, 113 Ariz. 22, 545 P.2d 946 (1976), and its progeny." *Id.* at 401 n.3, 996 P.2d at 1074 n.3. This rape-shield statute provides as follows:

> A. Evidence relating to a victim's reputation for chastity and opinion evidence relating to a victim's chastity are not admissible in any prosecution for any offense in this chapter. Evidence of specific instances of the victim's prior sexual conduct may be admitted only if a judge finds the evidence is relevant and is material to a fact in issue in the case and that the inflammatory or

prejudicial nature of the evidence does not outweigh the probative value of the evidence, and if the evidence is one of the following:

> (1) Evidence of the victim's past sexual conduct with the defendant.
>
> (2) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease or trauma.
>
> (3) Evidence that supports a claim that the victim has a motive in accusing the defendant of the crime.
>
> (4) Evidence offered for the purpose of impeachment when the prosecutor puts the victim's prior sexual conduct in issue.
>
> (5) Evidence of false allegations of sexual misconduct made by the victim against others.

B. Evidence described in subsection A shall not be referred to in any statements to a jury or introduced at trial without a court order after a hearing on written motions is held to determine the admissibility of the evidence. If new information is discovered during the course of the trial that may make the evidence described in subsection A admissible, the court may hold a hearing to determine the admissibility of the evidence under subsection A. The standard for admissibility of evidence under subsection A is by clear and convincing evidence.

A.R.S. § 13-1421.

13. Shortly after this statute's enactment, the Arizona Court of Appeals confronted two different constitutional challenges to this statute. *State v. Gilfillan*, 196 Ariz. 396, 400-04, ¶¶ 14-28, 998 P.2d 1069, 1073-77 (App.2000). These challenges were raised by a defendant whom the State charged with kidnapping, aggravated assault, sexual conduct with a minor, and attempted sexual conduct with a minor, based upon evidence showing that he beat, tied, and bound a 15-year-old girl, forced her to perform oral sex on him, and attempted to penetrate her vaginally. *Id.* at 399-400, ¶¶ 2-12, 996 P.2d at 1072-73. The defendant sought to introduce evidence that the victim had falsely accused a 13-year-old boy of attempted rape, but the trial court ruled after a hearing that the defendant had not presented clear and convincing evidence to satisfy the exception codified in A.R.S. § 13-1421(A)(5). *Id.* at 400, ¶ 11, 996 P.2d at 1073. On appeal, the defendant raised two different constitutional challenges to A.R.S. § 13-1421:

> [1] The defendant contends that the Arizona Rape Shield Law is unconstitutional on its face and as applied because it deprived him of his rights to due process, to present a defense and to confront witnesses according to the Fifth, Sixth and Fourteenth Amendments to the United

> States Constitution, and article 2, sections 4 and 24 of the Arizona Constitution. [2] He also claims that the statute intrudes upon the rule-making power of the Arizona Supreme Court pursuant to article 6, section 5 of the Arizona Constitution and that it violates the doctrine of the separation of powers under article 3 of the Arizona Constitution.

State v. Gilfillan, 196 Ariz. 396, 402, ¶¶ 18, 998 P.2d 1069, 1075 (App.2000).

14. The Arizona Court of Appeals in *Gilfillan* rejected the defendant's argument that the statute was facially unconstitutional because it deprived him his rights to due process, confrontation, and the presentation of defense evidence:

> The Arizona Rape Shield Law clearly implicates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article 2, sections 4 and 24 of the Arizona Constitution to the extent that it operates to prevent a criminal defendant from presenting relevant evidence, confronting adverse witnesses and presenting a defense. See *Michigan v. Lucas*, 500 U.S. 145, 149, 111 S.Ct. 1743, 114 L.Ed.2d 205 (1991). But a defendant's right to present relevant testimony is not limitless. *See Rock* [v. *Arkansas*], 483 U.S. [44,] 55, 107 S.Ct. 2704 [(1987)]. Rather, the right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).
>
> In *Lucas*, the Court held that the notice-and-hearing requirement of a rape shield statute serves a legitimate state interest in protecting against the harassment of a victim. 500 U.S. at 152-53, 111 S.Ct. 1743. As the Court wrote, because a rape shield statute is "designed to protect victims of rape from being exposed at trial to harassing or irrelevant questions concerning their past sexual behavior," *id*. at 146, 111 S.Ct. 1743, it "represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy." *Id*. at 150, 111 S.Ct. 1743. Thus, rape shield statutes have endured due process and Sixth Amendment challenges because "[t]he Sixth amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system." *United States v. Nobles*, 422 U.S. 225, 241, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975); *see* JOEL E. SMITH, ANNOTATION, CONSTITUTIONALITY OF "RAPE SHIELD STATUTE" RESTRICTING USE OF EVIDENCE OF VICTIM'S SEXUAL EXPERIENCES, 1 A.L.R.4th 283 (1980 & 1999 Supp.).
>
> The Arizona Rape Shield Law meets the requisite notice-and-hearing requirement. It mandates that there be a hearing on written motions to determine the admissibility of the evidence of the alleged rape victim's chastity. A.R.S. § 13-1421(B). The defendant is not absolutely

> denied an opportunity to present evidence. *See Lucas*, 500 U.S. at 146, 111 S.Ct. 1743. Rather, the statute provides procedural safeguards to admit evidence of the victim's prior sexual activity when that evidence has substantial probative value and when alternative evidence tending to prove the issue is not reasonably available. *See Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988) (It was a constitutional violation when a trial court excluded evidence of a rape victim's relationship with another man when evidence of that relationship would have provided strong evidence of her motive to lie about being raped and there was no alternative evidence that would have tended to show the same.); *United States v. Bear Stops*, 997 F.2d 451 (8th Cir. 1993) (It was a constitutional error to exclude evidence relating to a victim's sexual assault by other parties because the evidence was highly probative to establish an alternative explanation for why the victim exhibited the behavior of a sexually-abused child and no other evidence was reasonably available.).
>
> Given that "the constitutionality of such a law as applied to preclude particular exculpatory evidence remains subject to examination on a case by case basis," *Sandoval v. Acevedo*, 996 F.2d 145, 149 (7th Cir. 1993), the restrictions delineated in the Arizona Rape Shield Law are not disproportionate to the purpose the rape shield statute serves. *Cf. Rock*, 483 U.S. at 53-55, 107 S.Ct. 2704. The law provides procedural safeguards to reduce inaccuracies and prejudicial evidence, rather than an arbitrary and unconstitutional *per se* exclusion, *id*. at 61, 107 S.Ct. 2704, as is alleged by the defendant. The Arizona Rape Shield Law is constitutional.

State v. Gilfillan, 196 Ariz. 396, 402-03, ¶¶ 20-23, 998 P.2d 1069, 1075-76 (App.2000). *See also State v. Herrera*, 232 Ariz. 536, 550, ¶ 42, 307 P.3d 103, 117 (App.2013) (adhering to *Gilfillan* to reject arguments that A.R.S. § 13-1421 is unconstitutional because it violates the Sixth Amendment's rights to confront and cross-examine witnesses, transgresses the constitutionally mandated separation of powers between the judiciary and the legislature, and infringes upon the supreme court's rulemaking powers).

15. As the passage quoted above demonstrates, the Arizona Court of Appeals did *not* explicitly address the defendant's "as-applied" constitutional challenge. Instead, the *Gilfillan* court found A.R.S. § 13-1421 constitutional, based upon its findings that this statute served the legitimate state purpose of protecting rape victims against "surprise, harassment, and unnecessary invasions of privacy," did not seek to vindicate this interest through a *per se* prohibition of evidence of the victim's sexual history, but instead created a fact-intensive, case-by-case screening process that authorized judges to admit victim-sexual-history evidence that had substantial probative, exculpatory value, but was not unduly prejudicial to the victim.

N.B. In the author's view, the very best that can be said for the view that *Gilfillan* found the statute constitutional "as applied" to the defendant's proffered evidence is that the court of appeals *implicitly* found no violations of the defendant's federal constitutional rights to due process, confrontation, and the presentation of a defense in a subsequent portion of its opinion, wherein it upheld the trial court's preclusion of the victim's sexual past on the ground that that the defendant had not proven by clear and convincing evidence that the victim had made a false rape allegation. 196 Ariz. at 404-05, ¶¶ 29-33, 998 P.2d at 1077-78. However, the court of appeals never cast its holding in constitutional terms or otherwise indicated that the defendant suffered no constitutional violation because his evidence failed to satisfy the rape-shield statute.

16. Ample precedent would support any implied holding in *Gilfillan* that the trial court's preclusion order did not violate any of the defendant's constitutional rights because he failed to satisfy A.R.S. § 13-1421(B)'s burden of proof for admitting evidence of the victim's false rape allegation against another person.

A. Prevailing Supreme Court precedent posits that a defendant's right to present evidence is not unlimited, but may instead give way to the forum state's evidentiary and procedural rules, including the prerequisites of rape-shield statutes. *See Clark v. Arizona*, 548 U.S. 735, 770 (2006) ("While the Constitution ... prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.") (quoting *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006)); *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (upholding preclusion of defendant's polygraph test results pursuant to Federal Rule of Evidence 707 because "[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions"); *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996) ("Relevant evidence may, for example, be excluded on account of a defendant's failure to comply with procedural requirements."); *Michigan v. Lucas*, 500 U.S. 145, 149 (1991) ("To the extent that [Michigan's rape-shield statute] operates to prevent a criminal defendant from presenting relevant evidence, the defendant's ability to confront adverse witnesses and present a defense is diminished. This does not necessarily render the statute unconstitutional [because] the right to present relevant testimony is not without limitation [and] may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.") (internal quotations and citation omitted); *Taylor v. Illinois*, 484 U.S. 400, 410–11 (1988) ("The principle that undergirds the defendant's right to present exculpatory evidence is also the source of essential limitations on that right. The adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments"); *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) ("It does not follow, of course, that the Confrontation Clause of the Sixth

Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."); *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) ("The Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."); *United States v. Nobles*, 422 U.S. 225, 241 (1975) ("The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system."); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.").

B. The Arizona Supreme Court has followed suit: "Although a defendant has a fundamental constitutional right to confront witnesses and present a defense, the right is limited to the presentation of matters admissible under ordinary evidentiary rules, including relevance." *State v. Dickens*, 187 Ariz. 1, 14, 926 P.2d 469, 482 (1996) (citing *State v. Oliver*, 158 Ariz. 22, 30, 760 P.2d 1071, 1079 (1988)). *Accord State v. Prasertphong*, 210 Ariz. 496, 502, ¶ 26, 114 P.3d 828, 834 (2005) ("But 'in the exercise of this right [to present witnesses and evidence in his own defense], the accused, as is required of the State, the accused must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'") (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)); *State v. Harrod*, 200 Ariz. 309, ¶ 19, 26 P.3d 492 (2001) (holding that preclusion of third-party's statement against penal interest, based upon the defendant's inability to satisfy Arizona Rule of Evidence 804(b)(3)'s prerequisites, did not violate *Chambers v. Mississippi* because "the hearsay rule was not applied mechanistically and the exclusion [order precluded] an unreliable third party confession"). *See also State v. Abdi*, 226 Ariz. 361, 368, ¶ 32, 248 P.3d 209, 216 (App.2011) ("Although the right to present a defense is a fundamental constitutional right, it is subject to evidentiary rules. … Thus, the 'right to present evidence in one's defense is limited to evidence which is relevant and not unduly prejudicial.'") (quoting *Oliver*, 158 Ariz. at 39, 760 P.2d at 1079); *State v. Davis*, 205 Ariz. 174, 179, ¶ 33, 68 P.3d 127, 132 (App.2003) ("Defendant maintains that the trial court's rulings deprived him of his rights to a fair trial and to present evidence under the Fourteenth and Sixth amendments of the United States Constitution. However, a defendant's constitutional rights are not violated where, as here, evidence has been properly excluded.").

C. The Supreme Court and many lower courts have also held that the trial judge may constitutionally preclude evidence of the victim's sexual history when the defendant fails to satisfy the forum's procedural requirements for surmounting the jurisdiction's rape-shield bar, whether

created by statute or judicial decree. *See Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (holding that preclusion of defense evidence triggered by defendant's failure to comply with Michigan's rape-shield law's notice-and-hearing requirement did not constitute a *per se* violation of the Sixth Amendment and observing that the right to present relevant evidence is not unlimited and may give way to accommodate other legitimate interests); *Quinn v. Haynes*, 234 F.3d 837, 847–52 (4th Cir. 2000) (upholding West Virginia court's ruling that defendant could not introduce evidence of victim's alleged false accusations against a third party because the third party's denial of the prior act did not satisfy the rape-shield law's proof of falsity requirement); *Richmond v. Embry*, 122 F.3d 866, 871–75 (10th Cir. 1997) (noting that the state trial court properly excluded evidence of a victim's prior sexual history because the defendant did not follow the procedures set forth in Colorado's rape-shield law and failed to lay a proper foundation for an alleged prior act); *Reddick v. Hawes*, 120 F.3d 714, 717 (7th Cir. 1997) (defendant failed to lay prerequisite foundation for admission of 11-year-old daughter's alleged remarks acknowledging sexual contact with third party and assign a rough date to the alleged incident, as required by Illinois law); *Agard v. Portuondo*, 117 F.3d 696, 702–03 (2nd Cir. 1997) (upholding preclusion of questions regarding rape victim's prior consensual acts of anal intercourse, pursuant to New York's rape shield law, for two reasons: "Evidence of past sexual conduct and particularly of, perhaps, more unusual activities such as anal intercourse, is likely to distract a jury from the contemporaneous evidence it is asked to consider. And as for the probative side of the equation, it is far from clear what bearing prior consensual experience with a particular sexual practice has on the probability of trauma occurring during a subsequent non-consensual act."); *Freeman v. Erickson*, 4 F.3d 675, 678-79 (8th Cir. 1993) (upholding preclusion of cross-examination intended to show that the rape victim fabricated charge against the defendant because the defendant failed to lay proper foundation showing that the victim had a sexual partner who would have been displeased with the victim having consensual intercourse with the accused); *State v. Oliver*, 158 Ariz. 22, 30-31, 760 P.2d 1071, 1079-80 (1988) (upholding the preclusion of the victim's sexual history offered to show the victim's ability to fabricate allegations against the defendant because the trial court did not abuse its discretion in finding such evidence marginally probative and unduly prejudicial under Rule 403); *Roundtree v. United States*, 581 A.2d 315, 320-26 (D.C.1990) (finding no constitutional violation where the trial court precluded evidence of the victim's sexual-abuse allegations against other men because of insufficient proof of falsity and the danger of unfair prejudice and sidetracking the trial's focus from the defendant's charged conduct) (collecting cases); *State v. Molen*, 231 P.3d 1047, 1053-54 (Idaho App. 2010) (rejecting federal constitutional challenges to preclusion of evidence offered to prove the victim's ability to fabricate the charged allegations because the defendant failed to prove that the victim had actually witnessed the type of sexual conduct he alleged); *Commonwealth v. Herrick*, 655 N.E.2d 637, 639 (Mass.App.1995) (defendant failed to overcome rape-shield statutory bar because he relied solely upon "vague hope or speculation" to prove exception for motive to fabricate); *State v. Johnson*, 958 P.2d 1182, 1186, ¶ 24 (Mont.1998) ("Speculative or unsupported allegations are insufficient to tip the

scales in favor of a defendant's right to present a defense and against the victim's rights under the rape shield statute."); *State v. Tarrats*, 122 P.3d 581, 584-89 ¶¶ 17-48 (Utah 2005) (rejecting argument that trial court's preclusion order violated defendant's federal constitutional rights to confront hostile witnesses and present a defense, where the defendant failed to prove by a preponderance of the evidence that the victim had falsely accused another man of rape).

17. The *Gilfillan* court also rejected the separation-of-powers constitutional challenge to A.R.S. § 13-1421(B), which propounded a clear-and-convincing-evidence standard for admitting evidence of the victim's sexual history. 196 Ariz. at 403-04, ¶¶ 24-28, 996 P.2d at 1076-77. Some background law is useful at this point of the outline.

A. The foundation of this argument rests upon two interrelated state constitutional provisions: (1) Arizona Constitution Article III, which provides that the legislative, executive and judicial departments "shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to the others," and (2) Arizona Constitution Article VI, § 5(5), which endows the Arizona Supreme Court with the "power to make rules relative to all procedural matters in any court."

B. "Rules of evidence 'have generally been regarded as procedural in nature.'" *Seisinger v. Siebel*, 220 Ariz. 85, 88, ¶ 7, 203 P.3d 483, 486 (2009) (quoting *State ex rel. Collins v. Seidel*, 142 Ariz. 587, 590, 691 P.2d 678, 681 (1984)). *Accord Lear v. Fields*, 226 Ariz. 226, 230, ¶ 7, 245 P.3d 911, 915 (App.2011).

C. Despite having occasionally stated that its procedural rulemaking power rests "exclusively" within its domain, *see State v. Hansen*, 215 Ariz. 287, 289, ¶ 9, 160 P.3d 166, 168 (2007); *Daou v. Harris*, 139 Ariz. 353, 357-58, 678 P.2d 934, 938-39 (1984), the Arizona Supreme Court recently characterized such declarations as inaccurate "oversimplification[s]" and reiterated that "[a] statutory procedural enactment is not automatically invalid." *Seisinger v. Siebel*, 220 Ariz. 85, 88-89, ¶ 8, 203 P.3d 483, 486-87 (2009) (citing *State ex rel. Collins v. Seidel*, 142 Ariz. 587, 590, 691 P.2d 678, 681 (1984), for the proposition, "That we possess the rule-making authority does not imply that we will never recognize a statutory rule.").

D. The Arizona Supreme Court defined the constitutional parameters of the legislature's shared power to enact procedural rules as follows:

> Rather, we recognize "reasonable and workable" statutory enactments that supplement rather than conflict with rules we have promulgated. [*State ex rel. Collins v. Seidel*, 142 Ariz. 587, 591, 691 P.2d 678, 682 (1984)] (citation and internal quotation marks omitted); *see*

Readenour v. Marion Power Shovel, 149 Ariz. 442, 445, 719 P.2d 1058, 1061 (1986) (defining determinative issue as whether the statute "supplement[s] rather than contradict[s]" an evidentiary rule). **Therefore, it is more accurate to say that the legislature and this Court both have rulemaking power, but that in the event of irreconcilable conflict between a procedural statute and a rule, the rule prevails.**

The legislature thus cannot repeal a rule of procedure or evidence. *Seidel*, 142 Ariz. at 591, 691 P.2d at 682. But a statute may "contradict" or effectively abrogate a rule even if there is no express repeal. Accordingly, the legislature cannot enact a statute that "provides an analytical framework contrary to the rules" of evidence. *Barsema v. Susong*, 156 Ariz. 309, 314, 751 P.2d 969, 974 (1988).

Determining whether a statute unduly infringes on our rulemaking power requires analysis of the particular rule and statute said to be in conflict. Our cases provide some guidance on purported conflicts between statutes and rules of evidence. In *Readenour*, this Court upheld against a separation of powers attack A.R.S. § 12–686(2), which makes inadmissible "as direct evidence of a defect" evidence of changes made by the manufacturer after "the product was first sold by the defendant." 149 Ariz. at 444 n. 1, 719 P.2d at 1060 n. 1. The allegedly conflicting evidence rule was Rule 407, which makes remedial measures taken after an event supposedly giving rise to liability inadmissible "to prove negligence or culpable conduct." Rule 407 excludes from its general prohibition evidence offered for other purposes, such as to prove "ownership, control, or feasibility of precautionary measures." Readenour argued that the statute, by making inadmissible post- sale changes, conflicted with the Rule, which excludes only post- incident changes. *Readenour*, 149 Ariz. at 445, 719 P.2d at 1061.

We began from the proposition that "it is our duty to save a statute, if possible, by construing it so that it does not violate the constitution." *Id.* (citing *Ariz. Downs v. Ariz. Horsemen's Found.*, 130 Ariz. 550, 554, 637 P.2d 1053, 1057 (1981)). We therefore interpreted § 12–686(2), which prohibits evidence of changes only "as direct evidence of a defect," as permitting the uses of such evidence allowed under Rule 407. *Id.* This interpretation avoided any conflict between the statute and the exceptions in the Rule.

We then concluded that the statute's application to pre-injury but post-sale changes did not conflict with the Rule. *Id.* The Rule is silent on the admissibility of post-sale, pre-injury changes, so the statute did not expressly abrogate the Rule. Nor did the statute undermine the purposes of Rule 407. We concluded that the policy of the Rule is to encourage remedial measures, the probative value of the evidence excluded is not

high, and the extension of the prohibition to this period fosters the policy embodied in the Rule. *Id*. at 445–46, 719 P.2d at 1061–62. We therefore "defer[red] to the legislative decisions regarding the use or exclusion of relevant evidence to promote substantive goals of public policy such as accident prevention." *Id*. at 446, 719 P.2d at 1062. We also noted that § 12–686(2) "is similar to a privilege statute, having both procedural and substantive aspects." *Id*.

In contrast, in *Barsema* we found that a statute unconstitutionally conflicted with a rule of evidence. There, the statute at issue, A.R.S. § 12–569, prohibited "for any purpose" the admission of evidence that a witness has been or is covered by a certain type of medical malpractice insurer or has a financial interest in the operation of such an insurer. *Barsema*, 156 Ariz. at 311–12, 751 P.2d at 971–72. The conflicting rule was Evidence Rule 411, which prohibits admission of evidence that "a person was or was not insured against liability ... upon the issue whether the person acted negligently or otherwise wrongfully," but allows admission of such evidence when offered for another purpose, such as proof of "bias or prejudice of a witness."

Under Rule 411, evidence that a witness was insured could be admitted for purposes other than establishing liability if the trial judge found that it met the general Rule 402 requirement of relevancy and the Rule 403 requirement that its probative value was not "substantially outweighed by the danger of unfair prejudice" or other factors. *Barsema*, 156 Ariz. at 313, 751 P.2d at 973. In contrast, § 12–569 prohibited the use of such evidence "for any purpose." We were thus unable, as in Readenour, to construe the statute to avoid conflict with the rule. Instead, the mandate of Rule 411—that evidence of insurance offered for purposes other than to establish liability is to be evaluated on a case-by-case basis under Rules 402 and 403—had been superseded by a statutory regime in which the evidence was always excluded. We therefore concluded that § 12–569 unduly infringed on our rulemaking power because it does not "merely supplement[ ]" Rule 411, but rather "provides an analytical framework contrary to the rules." *Id*. at 314, 751 P.2d at 974.

Seisinger v. Siebel, 220 Ariz. 85, 89-90, ¶¶ 8-14, 203 P.3d 483, 487-88 (2009) (emphasis added). *Accord State v. Robinson*, 153 Ariz. 191, 196-98, 735 P.2d 801, 806-08 (1987) (finding A.R.S. § 13-1416 unconstitutional because it engulfed and contradicted the hearsay rules and intruded upon powers "at the core of the judicial function: defining what is reliable evidence and establishing judicial processes to test reliability"); *Lear v. Fields*, 226 Ariz. 226, 230-33, ¶ 9-19, 245 P.3d 911, 915-18 (App.2011) (holding that A.R.S. § 12-2203 conflicted with Arizona Rule of Evidence 702 by implementing the *Daubert* standard for admitting expert testimony that the Arizona Supreme Court had explicitly repudiated in *Logerquist*).

E. A finding of conflict between the evidentiary rule and statute is not alone sufficient to establish a separation-of-powers violation. "Before finding a statute unconstitutional, a court not only must find the statute conflicts with a rule but that the statute is procedural rather than substantive in nature." *Lear v. Fields*, 226 Ariz. 226, 230, ¶ 24, 245 P.3d 911, 915 (App.2011). *Accord Seisinger v. Siebel*, 220 Ariz. 85, 92, ¶ 24, 203 P.3d 483, 490 (2009) ("[W]hen a statute and a rule conflict, we traditionally inquire into whether the matter regulated can be characterized as substantive or procedural, the former being the legislature's prerogative and the latter the province of this Court.") (quoting *State v. Hansen*, 215 Ariz. 287, 289, ¶ 9, 160 P.3d 166, 168 (2007)).

> **1. "[T]he substantive law is that part of the law which creates, defines and regulates rights; whereas the adjective, remedial or procedural law is that which prescribes the method of enforcing the right or obtaining redress for its invasion."** *State v. Birmingham*, 96 Ariz. 109, 110, 392 P.2d 775, 776 (1964). *See also State v. Fletcher*, 149 Ariz. 187, 191-93, 717 P.2d 866, 870-72 (1986) (burden of proof for affirmative defense of insanity is a matter of substantive law within the legislature's domain).

> **2. This distinction is important because Article 4, Part 1, Section 1 of the Arizona Constitution confers the Legislature with the power to declare substantive law, the consequence of which is that a statute will trump any conflicting judicially-created substantive law.** *See Seisinger v. Siebel*, 220 Ariz. 85, 92, ¶ 26, 203 P.3d 483, 490 (2009) (collecting cases); *State v. Cheramie*, 218 Ariz. 447, 449, ¶ 9, 189 P.3d 374, 376 (2008) ("The legislature defines crimes and their elements, and 'courts may not add elements to crimes defined by statute'") (quoting *State v. Miranda*, 200 Ariz. 67, 69, ¶ 5, 22 P.3d 506, 508 (2001)); *State v. Mott*, 187 Ariz. 536, 541, 931 P.2d 1046, 1051 (1997) (holding that the Arizona Supreme Court lacks constitutional authority to adopt the diminished capacity defense); *State v. Fletcher*, 149 Ariz. 187, 191-92, 717 P.2d 866, 870-71 (1986) ("A change in the substantive law can be only given or denied by [the] constitution or the legislature of [this] state.") (quoting *State v. Birmingham*, 96 Ariz. 109, 110, 392 P.2d 775, 776 (1964)).

F. Returning to *Gilfillan*, the Arizona Court of Appeals rejected the argument that the clear-and-convincing-evidence standard promulgated by A.R.S. § 13-1421(B) usurped the judiciary's rule-making authority, based upon the following reasoning:

> The Arizona Constitution divides the powers of government into three departments and provides that "no one of such departments shall exercise the

powers properly belonging to either of the others." Ariz. Const. art. 3. Although the purpose of the doctrine of the separation of powers is to protect one branch of government against the overreaching of any other branch, common boundaries exist among the branches, and the doctrine does not require a "hermetic sealing off" of the branches of government one from another. *State v. Prentiss*, 163 Ariz. 81, 84-85, 786 P.2d 932, 935-36. (1989). "More than one department may have a legitimate and constitutionally permitted involvement in the same area [and] Department roles legitimately overlap in the attempt to prevent and punish criminal activity." *State v. Ramsey*, 171 Ariz. 409, 413, 831 P.2d 408, 412 (App.1992) (citations omitted).

The Arizona Constitution vests power to make procedural rules with the Arizona Supreme Court. Ariz. Const. art. 6, § 5. While rules of evidence generally are regarded as procedural, a statutory evidentiary rule may supplement the rules promulgated by the court. *See State ex rel. Woods v. Filler*, 169 Ariz. 224, 227, 818 P.2d 209, 212 (App.1991) (statute allowing hearsay testimony to establish probable cause in forfeiture proceeding not unconstitutional invasion of rulemaking authority absent showing inconsistent with purpose of hearsay exception in rules). An example is one codifying a workable, reasonable alternative method to a procedure encompassed in the Arizona Rules of Evidence. *See State ex rel. Collins v. Seidel*, 142 Ariz. 587, 591, 691 P.2d 678, 682 (1984) (statutory rule establishing procedure for evidentiary admission of results of blood alcohol tests not unconstitutional).

Both Subsections A and B of A.R.S. section 13-1421 supplement the evidentiary rules. Subsection A mirrors the Arizona Supreme Court's decision in *State ex rel. Pope v. Superior Court In and For Mohave County*, 113 Ariz. 22, 545 P.2d 946 (1976), with regard to the rules concerning the admission and exclusion of evidence in a sexual-assault case, and it is not inconsistent with other rules of evidence. [FN5] Subsection B provides that the admissibility of evidence described in subsection A must be established by clear and convincing evidence after notice and a hearing. [FN6] Although this standard is not found in *Pope* or the rules of evidence, the burden of proof is substantive, not procedural. *See State v. Fletcher*, 149 Ariz. 187, 192, 717 P.2d 866, 871 (1986), citing *Dick v. New York Life Ins. Co*., 359 U.S. 437, 446, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959); *see also Montana v. Egelhoff*, 518 U.S. 37, 55, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996), citing *McMillan v. Pennsylvania*, 477 U.S. 79, 89 n. 5, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986); *Patterson v. New York*, 432 U.S. 197, 201-02, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). Therefore, a legislative enactment that changes the burden of proof does not violate constitutional standards. *Fletcher*, 149 Ariz. at 192, 717 P.2d at 871; [FN7] *see also Egelhoff*, 518 U.S. at 55, 116 S.Ct. 2013 (1996); *Patterson*, 432 U.S. at 201-02, 97 S.Ct. 2319.

FN5. For example, evidence which is relevant is admissible, while irrelevant evidence is inadmissible. Rule 402, Ariz. R. Evid. Relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, Ariz. R. Evid. Subject to Rule 403, evidence of other crimes, wrongs or acts of a person is not admissible unless offered for a proper purpose. Rule 404(b), Ariz. R. Evid.; *State v. Ives*, 187 Ariz. 102, 111, 927 P.2d 762, 771 (1996). Opinion and reputation evidence may be admitted to prove a person's character for truthfulness if attacked, but specific past acts of untruthfulness may be excluded by the trial court if unrelated to the instant situation. Rule 608, Ariz. R. Evid.; *State v. Cook*, 151 Ariz. 205, 206, 726 P.2d 621, 622 (App.1986).

FN6. A similar procedure was approved in *Lucas*, 500 U.S. at 151-152, 111 S.Ct. 1743. *See also* Rule 104, Ariz. R. Evid. (hearing to determine admissibility of evidence conducted by trial court outside presence of jury).

FN7. For example, in *Fletcher*, the legislature enacted A.R.S. section 13-502(B), which placed the burden of proving the affirmative defense of insanity on the defendant, whereas, previously, if a defendant presented evidence that brought into question his sanity, the state was required to carry the burden of proving the defendant sane beyond a reasonable doubt. The Arizona Supreme Court found that the statute was substantive and did not violate the doctrine of the separation of powers. Additionally, the burden of proof in A.R.S. section 13-1421(B) parallels the requirement adopted by the supreme court that other-act evidence cannot be admitted unless it is proven by clear and convincing evidence that the other acts were committed by the defendant. *See State v. Terrazas*, 189 Ariz. 580, 582, 944 P.2d 1194, 1196 (1997).

The legislature had a legitimate governmental purpose in enacting the Arizona Rape Shield Law. The statute neither conflicts with existing rules of evidence nor hampers the judicial branch of government in the performance of its duties. [FN8] Therefore, A.R.S. section 13-1421 neither impermissibly infringes upon the Arizona Supreme Court's rulemaking authority nor violates the doctrine of the separation of powers.

FN8. Two courts also have rejected arguments that their respective state rape shield statutes impermissibly intrude upon the rulemaking power of the court or violate the doctrine of the separation of powers according to their state constitutions. *See State v. Mitchell*, 144 Wis.2d 596, 424 N.W.2d 698 (1988) (The legislature's adoption of a rape shield law was rational, did not defeat functioning of judicial system and was not an

> unconstitutional invasion of judicial power.); *People v. McKenna*, 196 Colo. 367, 585 P.2d 275 (1978) (The legislature had a legitimate interest in protecting rape victims and, because the statute did not conflict with existing rules, the rape-shield statute did not intrude into matters exclusively judicial.).

State v. Gilfillan, 196 Ariz. 396, 403-04, ¶¶ 24-28, & nn.5-8, 998 P.2d 1069, 1076-77 & nn.5-8 (App.2000).

G. Significantly, the Arizona Court of Appeals could have advanced *another* justification to support its conclusion that A.R.S. § 13-1421(B)'s clear-and-convincing-evidence burden of proof did not violate the Arizona Supreme Court's rulemaking authority on an additional ground—Arizona Constitution Article II, § 2.1(D) ("the Victim's Bill of Rights") endowed the Legislature with the authority to promulgate procedural rules to protect the constitutional rights of victims by stating:

> The *legislature*, or the people by initiative or referendum, *have the authority to enact* substantive and *procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section*, including the authority to extend any of these rights to juvenile proceedings.

(Emphasis added.)

H. Remarkably, the *very first* of 12 enumerated rights in the Victim's Bill of Rights is that the victim "be treated with *fairness, respect, and dignity*, and to be free *from intimidation, harassment, or abuse*, throughout the criminal justice process." Ariz. Const. art. II, § 2.1(A) (emphasis added). These constitutional objectives are the very raison d'être of rape-shield statutes. *See Lucas v. Michigan*, 500 U.S. 145, 146 (1991) ("The Michigan statute represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy."); *State v. Gilfillan*, 196 Ariz. 396, 400-01, ¶ 15, 998 P.2d 1069, 1073-74 (App.2000) ("Like the majority of states, Arizona has enacted a statute intended to protect victims of rape from being exposed at trial to harassing or irrelevant questions concerning any past sexual behavior."). *Accord United States v. Pumpkin Seed*, 572 F.3d 552 (8th Cir. 2009) ("There were numerous purposes for excluding this evidence under Rule 412. The exclusion saved Red Cloud from the harassment and embarrassment concomitant with discussing the details of one's past sexual activity, see id., and thwarted an 'unwarranted intrusion into [her] private life—[an effect] that [Federal] Rule [of Evidence] 412 was designed to prevent[.]'") (quoting *United States v. Bear Stops*, 997 F.2d 451, 455 (8th Cir. 1993)); *Quinn v. Haynes*, 234 F.3d 837, (4th Cir. 2000) ("The Supreme Court has recognized that a state has a valid interest in protecting victims of sexual abuse from needless harassment, humiliation and 'unnecessary invasions of privacy.' … Due to these concerns underlying the application of the rape shield law, West Virginia has a legitimate interest in requiring some showing of falsity to ensure that

the protection of its rape shield law applies when such protection is warranted.") (quoting *Lucas*, 500 U.S. at 150); *Richmond v. Embree*, 122 F.3d 866, 872 (10th Cir. 1997) ("The Supreme Court has held legitimate state interests behind a rape shield statute such as giving rape victims heightened protection against 'surprise, harassment, and unnecessary invasions of privacy' may allow the exclusion of relevant evidence if the state's interests in excluding the evidence outweigh the defendant's interests in having the evidence admitted. … These considerations are in addition to the more traditional concerns of prejudice, issue and jury confusion, which usually guide a trial court's evidentiary rulings.") (quoting *Lucas*, 500 U.S. at 150); *Agard v. Portuondo*, 117 F.3d 696, 703 (2nd Cir. 1997) ("Rape shield laws serve the broad purpose of protecting the victims of rape from harassment and embarrassment in court, and by doing so seek to lessen women's historical unwillingness to report these crimes."); *Stewart v. State*, 2012 WL 4459396 *5 (Ark. Sept. 27, 2012) ("The statute's purpose is to shield victims of rape or sexual abuse from the humiliation of having their personal conduct, unrelated to the charges pending, paraded before the jury and the public when such conduct is irrelevant to the defendant's guilt."); *State v. Hutchinson*, 141 Ariz. 583, 587, 688 P.2d 209, 213 (App.1984) ("'We note that in enacting the rape shield statute, [the Illinois] legislature intended to eliminate the cruel and abusive treatment of rape victims at trial by precluding the admission of irrelevant material concerning the intimate details of their past sexual activity.' … This is the same reasoning expressed by our supreme court in *Pope*.") (quoting *People v. Alexander*, 452 N.E.2d 591, 595 (Ill.App.1983)); *State v. Clifford P.*, 3 A.3d 1052, 1056 (Conn.App.2010) ("Our legislature has determined that, except in specific instances, and taking the defendant's constitutional rights into account, evidence of prior sexual conduct is to be excluded for policy purposes. Some of these policies include protecting the victim's sexual privacy and shielding her from undue [harassment], encouraging reports of sexual assault, and enabling the victim to testify in court with less fear of embarrassment."); *State v. Mitchell*, 568 N.W.2d 493, 497 (Iowa 1997) ("We begin our analysis by noting that rape shield laws like Iowa's rule 412 were enacted to (1) protect the privacy of victims, (2) encourage reporting, and (3) prevent time-consuming and distracting inquiry into collateral matters."); *State v. J.D.*, 48 A.3d 1031, 1036 (N.J.2012) (observing that New Jersey's rape-shield statute was "designed to 'deter the unwarranted and unscrupulous foraging for character-assassination information about the victim' and 'does not permit introduction of evidence of the victim's past sexual conduct to cast the victim as promiscuous or of low moral character.'") (quoting *State v. Schnabel*, 952 A.2d 452, 459 (N.J.2008).

18. *State ex rel. Montgomery v. Duncan (Real Party in Interest Fries)*, 228 Ariz. 514, 269 P.3d 690 (App.2011), is an important case because it addressed the scenario in which the defendant offers evidence of the victim's sexual history for a purpose *not* enumerated in A.R.S. § 13-1421(A)(1)-(5). The defendant sought to offer evidence that the victim had reported engaging in sexual activity with other males, ostensibly to substantiate the defendant's claim, pursuant to A.R.S. § 13-1407(B), that he had reasonably, but mistakenly, believed that the victim was older than 18 years of age. The trial judge denied the State's motion to preclude this evidence under the rape-shield statute. Accepting special-action jurisdiction, the Arizona Court of Appeals agreed with the State that A.R.S. § 13-1421 barred admission of this evidence because it did not fall

within any of the statute's five exceptions to the rape-shield law. However, the Arizona Court of Appeals did not end its constitutional analysis with its finding that the evidence was categorically barred by the statute. Instead, the panel explored whether the statute was constitutional "as applied" to the case and consequently remanded the case for the trial court to determine whether the preclusion of the proffered evidence would violate due process. The court of appeals indicated that such a violation would occur if the precluded evidence had substantial probative value, and the defendant had no other evidence of equal probative force available to present instead. This opinion, in pertinent part, reads as follows:

> Defendant was charged with four counts of sexual conduct with a minor. The State alleged that Defendant engaged in four acts of oral sexual intercourse with the Victim over approximately a two-week period. The State asserted that the Victim was fifteen years old at the time of the alleged events and that Defendant was thirty-eight. The trial court denied the State's pretrial motion to preclude statements allegedly made by the Victim to Defendant about the Victim's prior sexual conduct.
>
> We go directly to the issue before us. The evidence which the trial court deemed admissible was the Victim's alleged statement to Defendant that the Victim had engaged in oral sex with two other individuals. Defendant asserts that this testimony is admissible because it goes to his belief that the Victim was eighteen or older. The trial court found that this evidence was not prohibited by Arizona's rape shield law, Arizona Revised Statutes ("A.R.S.") section 13–1421 (2010). The trial court stated:
>
> > [This is] why I'm allowing its admission. I view this evidence differently than what the rape shield law was designed to protect against. The rape shield law was not designed to protect against a defendant from being able to raise a theory of defense that goes to an element of the offense, which this does. It also goes to confrontation. So there's actually two reasons that this is both relevant and I think would be reversible error to preclude.
> >
> > I do think a limiting instruction is appropriate. But, again, the Court finds it to be relevant to the theory of defense, specifically to refute the state of mind element of the offense, and with respect to confronting and cross-examining the victim when the victim testifies.
>
> In several key respects, we disagree with the trial court's analysis.
>
> First, the plain language of the statute prohibits this evidence. The statute provides:
>
> 13–1421. Evidence relating to victim's chastity; pretrial hearing

A. Evidence relating to a victim's reputation for chastity and opinion evidence relating to a victim's chastity are not admissible in any prosecution for any offense in this chapter. *Evidence of specific instances of the victim's prior sexual conduct may be admitted only if a judge finds the evidence is relevant and is material to a fact in issue in the case and that the inflammatory or prejudicial nature of the evidence does not outweigh the probative value of the evidence, and if the evidence is one of the following*:

1. Evidence of the victim's past sexual conduct with the defendant.

2. Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease or trauma.

3. Evidence that supports a claim that the victim has a motive in accusing the defendant of the crime.

4. Evidence offered for the purpose of impeachment when the prosecutor puts the victim's prior sexual conduct in issue.

5. Evidence of false allegations of sexual misconduct made by the victim against others.

A.R.S. § 13–1421(A) (emphasis added). It is conceded that the offered evidence does not fall into any of the five exceptions. Thus, the evidence is prohibited by the plain language of the statute. As to the trial court's statement that "the rape shield law was not designed to protect against the defendant from being able to raise a theory of defense that goes to an element of the offense," we respectfully disagree as no evidence would be relevant in the first place if it did not go to an element of an offense or an affirmative defense. The statute clearly applies. That does not, however, resolve the issue of admissibility.

The next question is whether, as Defendant asserted below, the statute is constitutional as applied to the evidence Defendant seeks to admit. We have previously found § 13–1421(A) to be constitutional on its face and as applied to the facts of the case then before us. *State v. Gilfillan*, 196 Ariz. 396, 401–03, ¶¶ 17–23, 998 P.2d 1069, 1074–76 (App.2000). In making that determination, we did not (and could not) preclude circumstances that may arise in the future in which the statute may be unconstitutional as applied. *Id*. Indeed, we referenced cases where evidence may be admissible notwithstanding the statutory bar if that evidence "has substantial probative value and when alternative evidence tending to prove the issue is not reasonably available." *Id*. at 403, ¶ 22, 998 P.2d at 1076.

In this case, the trial court did not engage in any balancing to determine whether there was a due process or other constitutional violation that would occur if the statute was given effect and the testimony was precluded. See *Romley v. Schneider*, 202 Ariz. 362, 365, ¶ 14, 45 P.3d 685, 688 (App.2002)

("[T]his is not a situation where rights granted to [the] victim under the Victim's Bill of Rights conflict with the defendant's federal constitutional rights."); *State ex rel. Romley v. Hutt*, 195 Ariz. 256, 259, ¶ 7, 987 P.2d 218, 221 (App.1999) ("[I]n *some cases* some victims' rights may be required to give way to a defendant's federal constitutional rights.") (emphasis added). Rather, the trial court found the evidence to be "relevant ... to refute the state of mind element [as to age] ... and with respect to confronting and cross-examining the victim when the victim testifies." The trial court concluded that this finding of relevancy trumped "the victim's rights."

A finding of relevancy alone does not act to trump victim's rights. As we stated in *Gilfillan*, "a defendant's right to present relevant testimony is not limitless." 196 Ariz. at 402, ¶ 20, 998 P.2d at 1075 (emphasis added); *see Rock v. Arkansas*, 483 U.S. 44, 56, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (same). Relevant testimony may be precluded, and in the circumstances here the pertinent statute may so require. Thus, the trial court must determine whether there is "such substantial probative value" that Defendant's constitutional rights would be impermissibly offended by the failure to permit evidence of the Victim's having oral sex in order to prove Defendant's belief that the Victim was eighteen or older. We direct the trial court to make that determination.

Further, the trial court expressly noted that the confrontation rights of Defendant would be offended if this evidence was not admitted. Because we are directing the court to further consider this issue, we comment specifically on that right and its application to the evidence that Defendant seeks to present. The purpose of cross-examination is to aid in the truth-finding process. *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) ("The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.'"). It is not apparent to us how cross-examining the *Victim* on this evidence will aid in the truth-seeking process as to what *Defendant's* belief was as to the Victim's age. Thus, the only affirmative inquiry that needs to be made is whether Defendant, in *his* testimony, should be permitted to testify on direct about how the Victim's alleged statements that the Victim had previously engaged in oral sex led Defendant to conclude that the Victim was at least eighteen. [FN1: Of course, if the State asserts that the victim would not have been able to describe oral sex, but for the alleged conduct of defendant, then the victim's alleged statements would be permissible to rebut that contention.] The test briefly described above would then apply as to whether the statute is unconstitutional as applied if this evidence is precluded.

Conclusion

For the reasons stated, relief is granted as set forth above.

228 Ariz. at 515-17, ¶¶ 2-9, 269 P.3d at 691-93 (emphasis in original).

19. The rest of the story: the defendant in *Duncan (Fries*) was convicted following a trial at which the evidence litigated during the special action was precluded. In the answering brief filed in Fries' direct appeal, *see* 2011 WL 10072059, the Arizona Attorney General's Office took the position that the *Duncan (Fries)* should be disavowed in a published opinion on two grounds: (a) although the defendant in *Gilfillan* raised an "as applied" constitutional challenge to A.R.S. § 13-1421, the Arizona Court of Appeals found A.R.S. § 13-1421 to be constitutional in *every* case; and (b) the procedural mechanism set forth in the rape-shield statute is rendered superfluous by the *Duncan* panel's determination that due process concerns requires trial judges to examine whether sexual-history evidence barred by A.R.S. § 13-1421 possesses "substantial probative value," and whether "alternative evidence tending to prove the issue … reasonably available" to the defendant. **The Arizona Court of Appeals affirmed the defendant's convictions, but did not adopt the State's arguments on direct appeal. The pertinent passage reads as follows:**

> ¶ 6 Defendant wanted to introduce evidence of the victim's sexual history outside of the enumerated statutory categories. *The court, as a result, had to determine whether precluding that evidence would violate Defendant's constitutional rights. See Fries,* 228 Ariz. at 516–17, ¶ 7, 269 P.3d at 692–93. In making its determination, the court reviewed Defendant's offer of proof and *determined that he had failed to articulate how or why the evidence of the victim's sexual history was relevant to prove his belief that the victim was over eighteen years old. There was, as the court noted, other admissible evidence that supported his argument that the victim was over eighteen; namely, the victim's avowal to Grindr that he was over eighteen years old. Consequently, we cannot conclude as a matter of law that the court abused its discretion by granting the motion in limine*.
>
> ¶ 7 Defendant also argues that the ruling prevented him from presenting his defense. We disagree. Although he was unable to place the victim's history as related to him before the jury, Defendant was given full opportunity to use admissible evidence to demonstrate that he had good reason to believe that the victim was eighteen years old or older, as well as to cross-examine the victim. The jury had to evaluate the evidence, including determining the credibility of the victim and weighing his testimony. It did. Consequently, we find no error.

***State v. Fries*, 2013 WL 1748345 *2 (Ariz. App. Apr. 23, 2013) (emphasis added).**

20. The Arizona Supreme Court's opinion in *State v. Dixon*, 226 Ariz. 545, 250 P.3d 1174 (2011), seemingly conflicts with *Duncan (Fries)* to the extent that the latter case ordered the trial judge on remand to engage in additional due-process-related analysis, despite the fact the defendant's reason for proffering evidence of the victim's sexual history fell outside the five categories enumerated in A.R.S.

§ 13-1421(A)(1)-(5). In *Dixon*, the defendant claimed that his sexual contact with the murder victim shortly before her death was consensual and sought to buttress that claim by offering a passage from the victim's diary wherein she memorialized being raped while in Europe several years earlier and her vow to carry a knife to defend herself against subsequent sexual assaults. Albeit without explicitly referencing the federal constitution (an omission possibly attributable to the defendant not raising any federal due process argument on appeal), the Arizona Supreme Court found such evidence categorically admissible under the rape-shield statute and therefore upheld the preclusion of the defendant's proffered evidence:

> Dixon argues that the trial court erroneously excluded an entry from Deana's diary, which he claims stated that she had been sexually assaulted in Europe and would fight back if assaulted again. Dixon argues that the evidence should have been admitted under Arizona Rule of Evidence 803(3) to show that his sexual contact with her was consensual, as she likely would have forcibly resisted an assault.
>
> Before trial, Dixon moved *in limine* to allow evidence that Deana was sexually active. This motion did not mention the diary or the trip to Europe. The court denied the motion, citing the rape shield law, A.R.S. § 13–1421(A) (2010).
>
> At trial, after Dixon asked Deana's mother about the diary, the prosecutor sought to exclude evidence from the diary on relevance and hearsay grounds. Dixon responded that he wanted to elicit the information from Deana's boyfriend, and added, "I doubt seriously I will use the diary itself." The court ruled that Dixon could inquire about a witness's first-hand knowledge of Deana's state of mind, but not about what was in the diary.
>
> Dixon then claimed for the first time that the diary referred to a sexual assault in Europe, and the court stated that it had
>
> > ruled under the rape shield law that her sexual activity or conduct is irrelevant, immaterial, and specifically excluded by statute unless you can fit it into one of the narrowly defined exceptions under the rule. You haven't given me a reason why this should now come in. Whether you call it an experience, a rape, a molestation, whether you call it consensual activity, whatever you call it, it's still sexual conduct under the statute.
>
> The judge subsequently allowed Dixon to ask Deana's boyfriend if she carried a knife for personal protection.
>
> The State contends that Dixon did not preserve any objection to exclusion of evidence from the diary because the record does not disclose what the document actually says. *See* Ariz. R. Evid. 103(a)(2) (requiring offer of proof to preserve objection to exclusion of evidence); *State v. Towery*, 186 Ariz. 168, 179, 920 P.2d 290, 301 (1996) (requiring, "[a]t a minimum, an offer of

proof stating with reasonable specificity what the evidence would have shown"). We agree. Although Dixon and counsel discussed what they claimed was in the diary, no offer of proof was made, nor was the diary marked for identification. We thus have no basis for determining precisely what evidence was excluded.

Even had the issue been properly preserved for appeal, and assuming the contents of the diary were as Dixon claimed, however, we would find no abuse of discretion in the trial court's ruling. *See State v. Villalobos*, 225 Ariz. 74, 82, ¶ 33, 235 P.3d 227, 235 (2010) (rulings excluding evidence are reviewed for abuse of discretion). The alleged statements had minimal probative value. Deana's state of mind years before the murder hardly establishes that she surely would or could have used a knife or other weapon to prevent this assault.

The diary evidence was also properly excluded under the rape shield law, which categorically prohibits evidence of "a victim's reputation for chastity," and allows evidence of "instances of the victim's prior sexual conduct" *only in limited circumstances <u>not</u> applicable here*. A.R.S. § 13–1421(A).

Dixon argues that a prior sexual assault is not "prior sexual conduct" because a sexual assault is a crime of violence, and thus also does not reflect on the victim's "chastity." The majority view, however, is that sexual assaults qualify as sexual conduct under rape shield laws. *See Grant v. Demskie*, 75 F.Supp.2d 201, 211–12 (S.D.N.Y.1999) (collecting cases). We agree; it would be anomalous to protect rape victims from questions about prior consensual conduct, but subject them to cross-examination about assaults. *Cf. State v. Oliver*, 158 Ariz. 22, 27, 760 P.2d 1071, 1076 (1988) (applying common law rape shield doctrine to child molestation victims).

State v. Dixon, 226 Ariz. 545, 553-54, ¶¶ 40-47, 250 P.3d 1174, 1182-83 (2011) (emphasis added).

<u>Unresolved issues.</u>

Arizona's rape-shield jurisprudence poses several unresolved questions, particularly in those cases wherein the defendant seeks to offer evidence that does not fall within one of the five statutory exceptions set forth in A.R.S. § 13-1421(A)(1)-(5). Some of these questions include the following:

1. If the defendant proffers victim-sexual-history evidence for a purpose *other than* the five enumerated exceptions in A.R.S. § 13-1421, should the trial court preclude the evidence under the categorical approach taken by the Arizona Supreme Court in *State v. Dixon*, 226 Ariz. 545, 250 P.3d 1174 (2006)? Or should the judge engage in the additional analysis outlined in *Duncan (Fries)*, which posits that "evidence may be admissible notwithstanding the statutory bar if that evidence 'has

substantial probative value and when alternative evidence tending to prove the issue is not reasonably available'[?]" 228 Ariz. at 516, ¶ 5, 269 P.3d at 692 (quoting *State v. Gilfillan*, 196 Ariz. 396, 403, ¶ 22, 998 P.2d 1069, 1076 (App.2000).

2. Because the Arizona Supreme Court has been endowed with preeminent constitutional authority to decree procedural rules, the separation-of-powers clause of the state constitution prohibits the Legislature from enacting statutes that conflict with the Arizona Rules of Evidence. Does A.R.S. § 13-1421(A)(1)-(5) conflict with Rules 401 though 403? As noted above, the statute recognizes only five exceptions to the rape-shield doctrine—the victim's past sexual conduct with the defendant; specific instances of sexual conduct to show the source or origin of semen, pregnancy, disease, or trauma; evidence supporting a claim that the victim has a motive to accuse the defendant of the crime; impeachment evidence when the prosecution puts the victim's sexual conduct in issue; and evidence of false allegations of sexual misconduct against others. Before the enactment of A.R.S. § 13-1421, the Arizona Supreme Court issued three decisions that unequivocally declared that other exceptions to the rape-shield doctrine exist. The pertinent passages follow:

(A) *Pope v. Superior Court*, 113 Ariz. 22, 29, 545 P.2d 946, 953 (1976):

> We envision that *there may be exceptions other than those noted above to the inadmissibility of evidence concerning the complaining witness' unchastity*. *Where, for instance, the defendant alleges the prosecutrix actually consented to an act of prostitution, the accused should be permitted to present evidence of her reputation as a prostitute and her prior acts of prostitution to support such a defense* [not among A.R.S. § 13-1421(A)(1)-(5)'s listed exceptions]. In addition, evidence concerning unchastity would be admissible in conjunction with an effort by the defense to show that the complaining witness has made unsubstantiated charges of rape in the past.
>
> (Emphasis added).

(B) *State v. Oliver*, 158 Ariz. 22, 27, 760 P.2d 1171, 1076 (1988):

> Moreover, we envisioned [in *Pope*] *other exceptions to the general rule, for instance, where a defendant alleges the victim actually consented to an act of prostitution*, or in conjunction with an effort by the defense to show that the victim had made unsubstantiated charges of rape in the past. … Arizona courts have implicitly held that *Pope's* list of exceptions is *not exhaustive*. [Citations and parenthetical comments omitted.] Before deciding whether to carve out another exception to Arizona's rape shield, we note that we reached our decision in *Pope* prior to the September 1, 1977, promulgation of the Arizona Rules of Evidence.
>
> (Emphasis added.)

Building upon the aforementioned passage, the Arizona Supreme Court in *Oliver* applied Arizona Rules of Evidence 401 and 402 to recognize yet another exception to the rape-shield statute *not* enumerated in Section 13-1421(A)—the victim's exposure to a prior sexual act that enabled him or her to contrive or fabricate the allegation against the defendant:

> For Rule 401 purposes, evidence is relevant if it has any tendency to make the existence of any fact that is of consequence more or less probable than it would be without the evidence. [Citations omitted.] This standard of relevance is not particularly high. [Citations omitted.] *We believe that if an accused raises the defense of fabrication, and if the minor victim is of such tender years that a jury might infer that the only way the victim could testify in detail about the alleged molestation is because the defendant had in fact sexually abused the victim, then evidence of the victim's prior sexual history is relevant to rebut such an inference*. [Citations omitted.] Exclusion of this evidence would unfairly curtail a defendant's ability to present a logical explanation for a victim's testimony.

Oliver, 158 Ariz. at 28, 760 P.2d at 1177 (emphasis added).

(C) *State v. Lujan*, 192 Ariz. 448, 452, ¶ 14, 967 P.2d 123, 127 (1998), reads as follows:

> But *Pope* allows a victim's prior sexual conduct to be admitted under some circumstances, such as when the alleged victim's previous acts with the accused may show consent, when the prosecution has opened the door by asserting the victim's chaste nature, or "*when the subjective intent of the assailant is an element of the crime*."

(Quoting *Pope*, 113 Ariz. 29, 545 P.2d at 953; emphasis added.)

The Arizona Supreme Court in *Lujan* reversed the defendant's child-molestation conviction because the trial court improperly precluded the defense from offering evidence that the victim's prior molestations had rendered her hypersensitive to the defendant's allegedly innocent physical contact with her at the time of the alleged offense—another exception not enumerated in A.R.S. § 13-1421(A)(1)-(5):

> *The evidence of Chelsie's prior abuse is admissible under Castro. First, Lujan's claim that Chelsie's previous sexual abuse resulted in misperception of physical contact is at least an arguably valid probative theory.* Also, Lujan laid a foundation connecting the factual predicate of abuse with the defense legal theory. *Moreover, Lujan made a sufficient offer of proof explaining why Chelsie might have incorrectly accused him*

> *of an inappropriate touching even if such touching did not occur. Finally, no prejudice, let alone unfair prejudice, would result from allowing the jury to hear evidence of Chelsie's prior abuse.* Prior abuse of such a young victim does not stigmatize, impugn moral character, or attack chastity. Indeed, defense counsel disavowed any attempt to impeach Chelsie, saying he sought only to inform the jury of the factors that might help explain Chelsie's allegations. R.T., Aug. 1, 1994, at 23–24.
>
> *Pope* does not allow a victim's sexual history to be used for character assassination, to attack truthfulness, or to establish evidence of willingness to engage in sexual relations on the theory that previous intercourse implies consent to all future acts. We know from *Oliver* that *Pope* is applicable to both rape and child molestation cases. But as the court of appeals has stated:
>
> > To conclude that *Pope* is applicable ... is not the end of analysis where sexual history is concerned. It should not have taken until Pope in 1976 for the law to determine that a woman's history of sexual relations is probative neither of her veracity as a witness nor of her consent to sexual relations in a given instance. *There may, however, be other probative purposes than these, and Pope does not proscribe them all.*
>
> *Castro*, 163 Ariz. at 469, 788 P.2d at 1220. This case presents an instance in which such evidence was probative.

State v. Lujan, 192 Ariz. 448, 453-54, ¶¶ 17-18, 967 P.2d 123, 128-29 (1998) (emphasis added).

Armed with these pronouncements from the Arizona Supreme Court and *Oliver's* invocation of Arizona Rules of Evidence 401-403, the defense bar could argue that A.R.S. § 13-1421 violates the state constitution's separation-of-powers provision because it narrows the categories of defense evidence that would otherwise be admissible. We might be able to blunt that argument by invoking Arizona Constitution Article II, § 2.1(D), which provides, "The *legislature*, or the people by initiative or referendum, *have the authority to enact* substantive and *procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section*, including the authority to extend any of these rights to juvenile proceedings." (Emphasis added.) And, as noted above, the Victim's Bill of Right's first provision guarantees victims the right "to be treated with *fairness, respect, and dignity*, and to be free *from intimidation, harassment, or abuse*, throughout the criminal justice process." Ariz. Const. art. II, § 2.1(A) (emphasis added). However, the efficacy of this counterargument is unknown because State has not yet presented this argument to the judiciary, and no opinions on this point have been issued.

3. The categorical preclusion of victim-sexual-history evidence for not falling within one of the five exceptions set forth in A.R.S. § 13-1421(A)(1)-(5) could also constitute the basis for the defense argument that such *per se* preclusion deprives the defendant of his *federal constitutional* rights to present a defense, confrontation, and due process. The Supreme Court has found violations of these constitutional rights in cases wherein important defense evidence had been precluded in "wholesale" fashion because of the mechanistic application of "evidence rules that 'infringe upon a weighty interest of the accused' and are 'arbitrary' or 'disproportionate to the purposes they were designed to serve.'" *Holmes v. South Carolina*, 547 U.S. 319, 324-25 (2006) (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (quoting *Rock v. Arkansas*, 483 U.S. 44, 58 (1987)). The Supreme Court defined "arbitrary" rules as those "rules that excluded important defense evidence but did not serve any legitimate interests." *Holmes*, 547 U.S. at 325. The following cases involved examples of such arbitrary rules that categorically precluded defense evidence at criminal trials:

- *Holmes v. South Carolina*, 547 U.S. 319, 324-25, 329-30 (2006) (reversing murder conviction because South Carolina's standard for admitting evidence that another person committed the offense required preclusion whenever the defendant could not "overcome the forensic evidence against him to raise a reasonable inference of his own innocence," because this rule arbitrarily predicated the admissibility of such defense evidence upon the strength of the *prosecution's* case, and this rule did not "not rationally serve the end that [the third-party-culpability rule was] designed to promote, *i.e.*, to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues").

- *Rock v. Arkansas*, 483 U.S. 44, 57, 61 (1987) (rule prohibiting hypnotically refreshed testimony was unconstitutional when applied to bar the defendant from testifying in her own defense at a murder trial because "[w]holesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all post-hypnosis recollections," the rule deprived the jury of the testimony of the only witness who was at the scene and had firsthand knowledge of the facts, and the rule infringed upon the defendant's interest in testifying in her own defense—which the Supreme Court found particularly significant, due to the defendant's status as the target of the prosecution).

- *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986) (rule prohibiting the defendant from challenging the reliability of his confession at trial, on the ground that the judge had made a pretrial ruling of the confession's voluntariness, violated the defendant's right to present a defense, where neither the state supreme court nor the prosecution "advanced any rational justification for the wholesale exclusion of this body of potentially exculpatory evidence," and "the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial").

- *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (finding a due process violation as a result of the combined application of Mississippi's common-law "voucher rule," which prevented a party from impeaching his own witness, and the state's hearsay rule, which had no exception for statements against penal interest; the defendant was consequently precluded from presenting the testimony of three persons to whom that witness had confessed; the Supreme Court noted that Mississippi had not even attempted to "defend" or "explain [the] underlying rationale" of its voucher rule).

- *Washington v. Texas*, 388 U.S. 14, 22-23 (1967) (characterizing as "arbitrary" state statutes that categorically prohibited the defendant from calling as a defense trial witness an alleged accomplice who had not been acquitted of the charged offense; the Supreme Court noted that these statutes could not "even be defended on the ground that it rationally sets apart a group of persons who are particularly likely to commit perjury" because the same participant could testify if he or she had been acquitted or was called by the prosecution).

The upshot: The State's ability to offer a rational justification for recognizing just the five rape-shield exceptions enumerated in A.R.S. § 13-1421(A)(1)-(5) will be significantly compromised by *Lujan, Oliver, Pope,* and *Castro,* wherein our very own courts had recognized *several other* exceptions to the rape-shield doctrine and repeatedly indicated the possibility that yet other exceptions might exist. The courts might also find this categorical limitation of victim-sexual-history evidence to be inequitable in light of Arizona's Rule 404(b) jurisprudence, which recognizes that the list of non-character purposes for admitting other-act evidence against the defendant is not exhaustive, but illustrative. *See, e.g., State v. Wood,* 180 Ariz. 53, 62, 881 P.2d 1158, 1167 (1994) ("This list of permissible purposes is merely illustrative, not exclusive.").

Countermeasures

1. Arizona's rape-shield statute is essentially an evidentiary rule—albeit one promulgated by our Legislature—that concerns a special class of witnesses (victims) and preconditions the admission of evidence of the victim's sexual conduct, for one of five specific purposes, upon the defendant's satisfaction of the traditional requirements of relevance and probative value exceeding the potential for unfair prejudice. *Cf. Agard v. Portuondo*, 117 F.3d 696, 703 (2nd Cir. 1997) ("In this respect, rape shield laws are an example of the court's traditional power to exclude evidence the prejudicial character of which far exceeds probative value."). Consequently, when the defendant seeks to offer evidence pursuant to one of the statute's five enumerated rape-shield exceptions, but falls short of satisfying all of the statute's procedural prerequisites for admissibility, appellate courts will uphold the trial court's preclusion order against federal constitutional challenges alleging violations of his rights to due process,

confrontation, and the presentation of a defense, except in very rare and extreme circumstances.[1]

2. Confidence in this general proposition stems from the Supreme Court's repeated assurances that "state and federal rule-makers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials," *United States v. Scheffer*, 523 U.S. 303, 308 (1998), and that "the Constitution leaves to judges who must make these decisions [concerning the admissibility of evidence] 'wide latitude' to exclude evidence that is 'repetitive …, only marginally relevant' or poses an undue risk of 'harassment, prejudice, or confusion of the issues.'" *Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). *See also Clark v. Arizona*, 548 U.S. 735, 770 (2006) ("While the Constitution ... prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.") (quoting *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006)).[2]

---

[1] *See, e.g., Olden v. Kentucky*, 488 U.S. 227 (1988) (finding the Sixth Amendment right to confrontation violated where the defendant was precluded from cross-examining the Caucasian rape victim about her cohabitation and extramarital relationship with an African-American man, not because the defendant failed to satisfy Kentucky's rape-shield statute, but because the trial court found such evidence's "probative value … outweighed by its possibility for prejudice," and noting the absence other reasonably available evidence to prove the victim's motive to falsely accuse the defendant of rape); *United States v. Bear Stops*, 997 F.2d 451, 454-57 (8th Cir. 1993) (trial court violated defendant's federal constitutional rights by precluding evidence that three older boys had sexually abused the victim as unduly prejudicial, pursuant to Federal Rule of Evidence 403, because the evidence left available to the defendant rendered him unable to prove his defense that the victim exhibited the symptoms of a sexually-abused child because of the misconduct of others); *State v. Gilfillan*, 196 Ariz. 396, 403, ¶ 22, 996 P.2d 1069, 1076 (App.2000) (citing *Olden* and *Bear Stops* while observing that A.R.S. § 13-1421 "provides procedural safeguards to admit evidence of the victim's prior sexual activity when that evidence has substantial probative value and when alternative evidence tending to prove the issue is not reasonably available.").

[2] *See also Taylor v. Illinois*, 484 U.S. 400, 410 (1988) ("The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."); *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996) ("Relevant evidence may, for example, be excluded on account of a defendant's failure to comply with procedural requirements.") (citing *Michigan v. Lucas*, 500 U.S. 45, 51 (1990)); *State v. Prasertphong*, 210 Ariz. 496, 502, ¶ 26, 114 P.3d 828, 834 (2005) ("But 'in the exercise of this right [to present witnesses and evidence in his own defense], the accused, as is required of the State, the accused must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'") (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)); *State v. Dickens*, 187 Ariz. 1, 14, 926 P.2d 469, 482 (1996) ("Although a defendant has a fundamental constitutional right to confront witnesses and present a defense, the right is limited to the presentation of matters admissible under ordinary evidentiary rules, including relevance."); *State v. Oliver*, 158 Ariz. 22, 30, 760 P.2d 1071, 1079 (1988) ("However, the Sixth Amendment right to present evidence in one's defense is limited to evidence which is relevant and not unduly prejudicial."); *State v. Davis*, 205 Ariz. 174, 179, ¶ 33, 68 P.3d 127, 132 (App.2003) ("Defendant maintains that the trial court's rulings deprived him of his rights to a fair trial and to present evidence under the Fourteenth and Sixth amendments of the United States Constitution. However, a defendant's constitutional rights are not violated where, as here, evidence has been properly excluded.").

3. When the defendant offers evidence of the victim's sexual history for a purpose *not* enumerated by one of the five enumerated statutory exceptions to the rape shield, the following countermeasure will *simultaneously* guard against reversal on *both* the state constitution's separation-of-powers clause and the defendant's federal constitutional rights to present a defense under the Sixth and Fourteenth Amendments:

Instead of relying exclusively on the rape-shield statute, the State should also argue that the proffered evidence is inadmissible because the defendant has not satisfied Arizona Rule of Evidence 401's relevance requirement and/or survive balancing under Arizona Rule 403.

A. This approach avoids the conflict between the statute recognizing just five rape-shield exceptions and Arizona Supreme Court precedent indicating the non-exclusive nature of exceptions to the rape-shield rule and the necessity of utilizing Rules 401, 402, and 403 to determine the admissibility of such evidence (*i.e.*, *Lujan*, *Oliver*, and *Pope*). Resort to Rules 401 through 403 in this situation squarely comports with *Oliver*, wherein the high court applied these rules to recognize an exception not referenced in *Pope*—specific acts manifesting the victim's sexual knowledge and consequent ability to contrive the charged sexual-abuse allegations against the defendant. 158 Ariz. at 28-29, 760 P.2d at 1076-77. When the defendant seeks to offer evidence pursuant to an exception recognized by Arizona's appellate courts, the State should cite precedent from Arizona (and, if necessary, other jurisdictions) concerning that common-law rape-shield exception.

B. Application of Rules 401, 402, and 403 also negates the possibility that the conviction will be reversed on the ground that the statute required wholesale exclusion of all sexual-history evidence falling outside A.R.S. § 13-1420's five narrow categories of evidence. Resort to the broader and more fact-intensive standards set forth in Rules 401-403 will remove this type of case from the parameters of cases that mandated reversal for the wholesale exclusion of entire categories of evidence (*i.e.*, *Holmes*, *Crane*, *Rock*, *Chambers*, and *Washington*) and place it squarely within precedent explicitly acknowledging the constitutionality of precluding evidence that is marginally relevant, unduly prejudicial, cumulative, likely to cause juror confusion or delay, or otherwise not compliant with the forum's evidentiary rules (i.e., *Scheffer*, *Egelhoff*, *Lucas*, *Taylor*, *Van Arsdalli*, *Prasertphong*, *Dickens*, *Oliver*, and *Davis*).

C. Demonstrating that the proffered evidence is marginally relevant and subject to exclusion under Rule 403 also satisfies the *first* of the two-part inquiry that the Arizona Court of Appeals articulated for finding the rape-shield statute constitutional "as applied" in *Duncan (Fries)*: whether the federal constitution requires the statutorily-precluded evidence

nonetheless to be admitted because it "has substantial probative value." 228 Ariz. at 516, ¶ 5, 269 P.3d at 692 (quoting *State v. Gilfillan*, 196 Ariz. 396, 403, ¶ 22, 998 P.2d 1069, 1076 (App.2000)).

4. The second countermeasure—one that admittedly addresses only the federal constitutional provisions—is to demonstrate that preclusion of the proffered evidence does not prejudice the defendant because "alternative evidence tending to prove the issue is [nonetheless] reasonably available." *State ex rel. Montgomery v. Duncan (Fries)*, 228 Ariz. 514, 516, ¶ 5, 269 P.3d 690, 692 (App.2011) (quoting *State v. Gilfillan*, 196 Ariz. 396, 403, ¶ 22, 998 P.2d 1069, 1076 (App.2000)). Toward that end, the State should make sure that the record reflects all of the alternative evidence that the defendant could offer that collectively or individually has as much or greater probative value than the precluded victim-sexual-history evidence. If the State cannot make this showing, the prosecution should consider alternative ways of presenting the jury with the desired information in a manner that accomplishes the defendant's objective, but minimizes the potential of embarrassing or humiliating the victim. The Arizona Supreme Court endorsed such a practice:

> The trial court ruled that, as a general proposition, *Pope* and *Lindsey* prohibit the admission of a victim's prior sexual history. [Footnoted omitted.] However, the trial court also found that Oliver was entitled to inform the jury that Jackie had independent knowledge of sexual matters; particularly, the trial court believed it was important that the jury understood that, prior to the alleged molestation, Jackie had knowledge of seminal fluids and ejaculation. *To accomplish this goal, the trial court permitted either the defendant or the State, through leading questions, to draw forth from Jackie an admission that she had independent knowledge of ejaculation from experiences with someone other than Oliver*.
>
> Shortly before opening statements, the State and Oliver agreed to the form of the questions to be put to Jackie concerning her prior knowledge of ejaculation and seminal fluids. *On direct examination, the State asked Jackie the following question:*
>
> > Okay. Now, before this happened [the Oliver molestation] you knew that when people had sex that white stuff would sometimes come out of men's penises?
> >
> > Jackie answered yes to the question.
>
> We believe that the trial court's actions are in keeping with the spirit of the rule we have articulated today. The trial court listened to an offer of proof [footnote omitted] and, presumably, after determining that a sufficiently similar prior molestation occurred, admitted evidence of Jackie's independent knowledge of ejaculation and seminal fluids.

> Moreover, we approve of the trial court's decision to restrict how the parties could elicit from Jackie evidence of her sexual knowledge. *Although Oliver was entitled to present evidence that Jackie was familiar with seminal fluid and ejaculation, the trial court had a duty to protect Jackie "from harassment or undue embarrassment."* Rule 611(a)(3), Ariz.R.Evid., 17A A.R.S. (Supp.1987); *United States v. Colyer*, 571 F.2d 941, 947, n.7 (5th Cir. 1978). Whenever possible, we believe the trial court should endeavor to protect minor victims from unwarranted and unreasonably intrusive cross-examination by requiring counsel to demonstrate, if possible, independent knowledge of sexual matters without producing evidence of the details of the victim's previous sexual experience. *See generally Arenda*, 416 Mich. at 13, 330 N.W.2d at 818.

State v. Oliver, 158 Ariz. 22, 29-30, 760 P.2d 1071, 1078-79 (1988) (emphasis added). *Accord Richmond v. Embree*, 122 F.3d 866, 873 (10th Cir. 1997) ("It is also noteworthy the defense was not foreclosed from cross-examining the medical witnesses, or from introducing testimony to suggest the hymenal damage was due to a source other than Mr. Richmond. Specifically, the defense cross-examined the doctors as to whether the victim's use of tampons could have caused the hymenal damage.").

> **N.B. "A defendant's confrontation rights are satisfied when the cross-examination permitted exposes the jury to facts sufficient to evaluate the credibility of the witnesses and enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable."** *Mills v. Singletary*, 161 F.3d 1273, 1288 (11th Cir. 1998). *Accord United States v. Aldridge*, 413 F.3d 829, 834 (8th Cir. 2005) ("Generally, if other avenues for impeachment exist, there is no Confrontation Clause issue from the exclusion of particular impeachment evidence."); *United States v. Laljie*, 184 F.3d 180, 192 (2nd Cir. 1999) ("Cross-examination is not improperly curtailed if the jury is in possession of facts sufficient to make a discriminating appraisal of the particular witness' credibility."); *State v. Canez*, 202 Ariz. 133, 153-54, ¶¶ 62-64, 42 P.3d 564, 583-84 (2002) (limitation on cross-examination constitutional where defendant was allowed to impeach co-defendant with his usual drug use and consumption on night of murder, his unclear memory, and need for money for drugs); *State v. Schrock*, 149 Ariz. 433, 438, 719 P.2d 1049, 1054 (1986) ("After reviewing the record, we feel the trial judge allowed ample cross-examination on relevant matters for the jury to assess the credibility of Alvarez as a witness."); *State v. Bracy*, 145 Ariz. 520, 533, 703 P.2d 464, 477 (1985) (test of reasonable limit on cross-examination is whether jury is otherwise in possession of sufficient information to assess the bias and motives of the witness); *State v. Thompson*, 108 Ariz. 500, 503, 502 P.2d 1319, 1322 (1972) (inquiry regarding witness' current drug addiction was properly precluded because the witness already admitted prior felony convictions, drug usage, and prostitution).

5. The State may also successfully achieve the preclusion of evidence of the victim's sexual history by demonstrating that the defendant cannot lay the foundation for the questions he wishes to ask the victim because the basis for his inquiries are hopeful speculation, surmise, and conjecture. "One salubrious limitation that courts have developed holds that a party who seeks to cross-examine a witness for the purpose of impeaching his credibility cannot base his queries solely on hunch or innuendo." *United States v. Zaccaria*, 240 F.3d 75, 81 (1st Cir. 2001). *Accord United States v. Musares*, 405 F.3d 161, 170-71 (3rd Cir. 2005) ("In addition, there was no evidence of a plea bargain in the pending case that was contingent upon Taylor testifying in this case; Mussare's counsel merely speculated that might be the case."); *Searcy v. Jaimet*, 332 F.3d 1081, 1088 (7th Cir. 2003) ("It is well established that purely conjectural or speculative cross-examination is neither reasonable nor appropriate.") (collecting cases); *United States v. Lo*, 231 F.3d 471, 482-83 (9th Cir. 2000) (affirming limitation on cross-examination into fraud allegations because of "the highly speculative nature" of those allegations); *United States v. Beardslee*, 197 F.3d 378, 383 n.1 (9th Cir. 1999) (upholding limitation on cross-examination where the record contained no showing that the witness had been subjected to undue influence because of his probationary status); *Bui v. DiPaolo*, 170 F.3d 232, 243 (1st Cir. 1999) ("One well-established basis for circumscribing cross-examination is a party's inability to lay a foundation for the questions he wishes to pose.") (collecting cases); *United States v. Sinclair*, 109 F.3d 1527, 1537 (10th Cir. 1997) (precluding cross-examination of witness with an alleged offer of leniency in exchange for testimony because of lack of factual support); *United States v. Ovalle-Marquez*, 36 F.3d 212, 219 (1st Cir. 1994) ("While the purpose of cross-examination is to impeach the credibility of a witness, the basis for the impeachment cannot be speculation and innuendo with no evidentiary foundation."); *United States v. Townsend*, 31 F.3d 262, 269 (5th Cir. 1994) (precluding cross-examination absent foundation that witness was coloring testimony to avoid tax liability); *United States v. Warren*, 18 F.3d 602, 603 (8th Cir. 1994) (precluding cross-examination where defendant did not lay foundation for theory that the witness was cooperating with prosecution as part of a desperate attempt to regain custody of his children in protective custody); *United States v. Carty*, 993 F.2d 1005, 1009 (1st Cir. 1993) (no foundation for precluded cross-examination into whether police officer was under investigation and was testifying with a view of impressing the federal government); *United States v. Sutherland*, 929 F.2d 765, 777 (1st Cir. 1991) (precluding inquiry about pending civil forfeiture against government witness absent foundation of a bargain with the prosecution); *State v. Riggs*, 189 Ariz. 327, 331, 942 P.2d 1159, 1163 (1997) (precluding impeachment of victims with their invocation of right to refuse a defense interview because defendants failed to make "some showing that the victims refused the interviews for a reason or a manner bearing on their credibility"); *State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982) ("We hold that before psychiatric history of a witness may be admitted to discredit him on cross-examination, the proponent of the evidence must make an offer of proof showing how it affects the witness's ability to observe and relate the matters to which he testifies."); *State v. Adams*, 155 Ariz. 117, 122, 745 P.2d 175, 180 (App.1987) (upholding preclusion of cross-examination into whether victim had stolen defendant's vehicle where "counsel simply raised the inference of theft and presented no evidence to support it" and was thus

"essentially asking to be allowed to question the witness by innuendo, which is prohibited"); *State v. Riley*, 141 Ariz. 15, 20-21, 684 P.2d 896, 901-02 (App.1984) ("Here, the defendant presented no offer of proof indicating that Harris received any special consideration by the police as a result of being an informant. ... Under these circumstances, we can find no abuse of discretion by the trial court in refusing to permit defense counsel to, in effect, go on a fishing expedition as to whether Harris may have at some point in the past received some compensation, other than money, for his work as an informant."); *State v. Ballantyne*, 128 Ariz. 68, 71, 623 P.2d 857, 860 (App.1981) ("To ask a question which implies the existence of a prejudicial factual predicate which the examiner cannot support by evidence is unprofessional conduct and should not be condoned."); *Davenport v. Commonwealth*, 177 S.W.3d 763, 771 (Ky.2005) ("Other than the plain fact of Davenport's probationary status, defense counsel offered no evidence whatsoever to support the claim that he was motivated to testify in order to curry favor with authorities. Nor was there any evidence that prosecutors had offered Davenport a 'deal' for his testimony. In short, the claim was purely speculative."); *State v. Moore*, 252 S.W.3d 272, 276 (Mo.App.2008) ("Speculating or theorizing motives for testifying is not sufficient to show the connection that is necessary to obviate the trial court's discretion.").

Courts have applied this rule in the rape-shield context: "Speculative or unsupported allegations are insufficient to tip the scales in favor of a defendant's right to present a defense and against the victim's rights under the rape shield statute." *State v. Johnson*, 958 P.2d 1182, 1186, ¶ 24 (Mont.1998). *See also Freeman v. Erickson*, 4 F.3d 675, 678–79 (8th Cir. 1993) (upholding preclusion of evidence of victim's consensual sexual encounter as proof of motive to fabricate because defendant "failed to establish that the victim was seriously involved with a third party, much less a jealous boyfriend"); *State v. Oliver*, 158 Ariz. 22, 32, 760 P.2d 1071, 1081 (1988) ("In Arizona, evidence of prior sexual history is inadmissible on the issue of motive unless the record clearly establishes a factual predicate from which the motive can be inferred."); *State v. Lindsey*, 149 Ariz. 3493, 498, 720 P.2d 94, 99 (App.1985) (absent evidence that the victim had intercourse with anyone besides the defendant during the time of conception, preclusion of intercourse with other men outside that period was proper); *State v. Holley*, 123 Ariz. 382, 384-85, 599 P.2d 835, 837-38 (App.1979) (upholding preclusion of cross-examination into victims' prior sexual history because the defense failed to establish "a factual predicate from which [the] motive to fabricate can be inferred" because a contrary holding "would make this [motive to fabricate] exception to the [rape-shield] rule limited only by defense counsel's imagination"); *State v. Grice*, 123 Ariz. 66, 70, 597 P.2d 548, 552 (App.1979) (commenting, "From all that appears in the record, the plot conceived by appellant existed only in the mind of his counsel," because defendant offered no evidence to support theory's factual premise that the rape victim's mother was unaware of her sexual relationship with boyfriend); *State v. Sullivan*, 712 A.2d 919, 924–25 (Conn.1998) (upholding preclusion of cross-examination of victim and her father about an allegedly false prior accusation of rape, where, inter alia, "the defendant's assertions in his offer of proof were too speculative to require a determination that the victim had made prior false statements to her father regarding a previous sexual assault"); *State v. Molen*, 231 P.3d 1047, 1053 (Idaho App. 2010) ("Evidence that S.Z.'s mother had sex while S.Z. was "in

the home" is not equivalent to evidence that S.Z. was present in the same room and actually observed the acts, nor does the remainder of the offer of proof identify specific instances where S.Z. observed acts or bodily conditions like those described in her testimony concerning Molen. Because this offer of proof did not tend to show that S.Z. had prior knowledge that would have enabled her to fabricate the specific acts alleged against Molen, the proffered evidence was not shown to be relevant. In the absence of a showing of relevance, we need not discuss application of the Rule 403 balancing test."); *Commonwealth v. Herrick*, 655 N.E.2d 637, 639 (Mass.App.1995) (defendant seeking to overcome a rape shield statute with evidence allegedly showing motive to fabricate must show that "the theory under which he proceeds is based on more than vague hope or mere speculation"); *State v. McFarland*, 604 S.W.2d 613, 617 (Mo.App.1980) (rejecting claim that victim fabricated charge of rape because she was 9 days late in her menstrual cycle, worried that she had become pregnant by consensual intercourse, and feared telling her parents where "the record is void of any evidence of such fear or emotional upset on the part of the prosecutrix"); *State v. Mitchell*, 808 A.2d 62, 64 (N.H.2002) ("On this record, imputing a motive to fabricate an allegation of sexual abuse from the stormy relationship between the defendant and the victim's mother would be pure speculation."); *Milenkovic v. State*, 272 N.W.2d 320, 326 (Wis.App.1978) (upholding preclusion of evidence of victim's gonorrhea, which defendant claimed motivated the victim to fabricate, because "there was no offer to prove that the [victim's] boyfriend did not know before the rape that she had gonorrhea").

6. Courts may also preclude evidence or cross-examination concerning the victim's sexual history that is minimally probative and/or outweighed by the danger of unfair prejudice or distracting the jury. *See United States v. Hitt*, 473 F.3d 146, 156-57 (5th Cir. 2006) (upholding preclusion of cross-examination regarding marginally probative evidence of the victim's motive to fabricate did not violate Sixth Amendment right to confrontation) (citing *United States v. White Buffalo*, 84 F.3d 1052, 1053-54 (8th Cir. 1996)); *United States v. Powell*, 226 F.3d 1181, 1199 (10th Cir. 2000) ("We likewise believe that the relevance of Jane's alleged conduct to rebut any inference the jury may have drawn regarding her sexual naivety is too attenuated, particularly in light of Richmond 's charge that we must balance the government's interest in excluding the proffered evidence against the defendant's interest in its admittance."); *Agard v. Portuondo*, 117 F.3d 696, 702–03 (2nd Cir. 1997) (upholding preclusion of questions regarding rape victim's prior consensual acts of anal intercourse, pursuant to New York's rape shield law, for two reasons: "Evidence of past sexual conduct and particularly of, perhaps, more unusual activities such as anal intercourse, is likely to distract a jury from the contemporaneous evidence it is asked to consider. And as for the probative side of the equation, it is far from clear what bearing prior consensual experience with a particular sexual practice has on the probability of trauma occurring during a subsequent non-consensual act."); *Wood v. Alaska*, 957 F.2d 1544, 1550 (9th Cir. 1992) (rejecting Confrontation Clause challenge to preclusion of cross-examination of rape victim about previously posing for *Penthouse* and starring in pornographic films because the danger of unfair prejudice far exceeded any probative value); *State v. Rodriguez*, 186 Ariz. 240, 251, 921 P.2d 643, 654 (1996) (murder defendant was properly precluded from presenting evidence of victim's prior sexual history, as evidence of her promiscuity and

sexually-inviting behavior with other men was absolutely irrelevant to the defense that someone else killed her); *State v. Oliver*, 158 Ariz. 22, 28-29, 760 P.2d 1071, 1077-78 (1988) ("Accordingly, if, in the discretion of the trial court, the defendant's offer of proof does not establish either that a victim had prior sexual experience, or that this prior sexual experience provided the victim with the ability to fabricate in the present case, then the trial court should exclude the evidence because its probative value is substantially outweighed by the danger of unfair prejudice."); *State v. Lindsey*, 149 Ariz. 493, 498-99, 720 P.2d 94, 99-100 (App.1985), *aff'd in part and vacated in part*, 149 Ariz. 472, 720 P.2d 73 (1985) (in a prosecution for incest and sexual exploitation of a minor, evidence that molestation victim had intercourse with others several weeks or months before and after her pregnancy was inadmissible for the purpose of demonstrating that defendant was not the father, absent additional evidence that the victim had intercourse with other men at the time of conception); *State v. Garcia*, 138 Ariz. 211, 216, 673 P.2d 955, 960 (App.1983) (precluding, in a rape prosecution, evidence of the victim's unchaste sexual conduct short of intercourse because it did not rebut the state's claim that she had been a virgin before the sexual assault); *State v. Tarrats*, 122 P.3d 581, 588 ¶¶ 41-47 (Utah 2005) (upholding preclusion of evidence of victim's false allegation against another, which the court deemed to have "little probative value because the facts surrounding the prior allegation are so attenuated from the facts of the case before us today," and which the court found would confuse the issues and engender a mini-trial).

7. Justifiable concern that the proffered evidence will engender mini-trials regarding the victim's sexual past constitutes a valid basis for preclusion under Rule 403. *See United States v. Hitt*, 473 F.3d 146, 157 (5th Cir. 2006) ("Admission of [prior sexual abuse allegations] would have triggered mini-trials concerning allegations unrelated to [the present] case, ... increas[ing] the danger of jury confusion and speculation.") (quoting *United States v. Tail*, 459 F.3d 854, 861 (8th Cir. 2006) (alterations in original); *Pope v. Superior Court*, 113 Ariz. 22, 28, 545 P.2d 946, 952 (1976) ("Reference to prior unchaste acts of the complaining witness injects collateral issues into the case which … divert the jury's attention from the real issues, the guilt or innocence of the accused.") (collecting cases); *State v. West*, 24 P.3d 648, 654 (Haw.2001) (upholding the preclusion of evidence of a prior allegation that the defendant could not prove to have been false and noting, "It should be observed that the rule ... does not permit the trial to stray from the central issue of the guilt or innocence of the defendant into a full-scale investigation of charges made by the prosecutrix against other persons. That would be intolerable. The rule is limited to the reception of evidence that the prosecutrix has admitted the falsity of the charges or they had been disproved") (quoting *Little v. State*, 413 N.E.2d 639, 643 (Ind.App.1980)); *Fugett v. State*, 812 N.E.2d 846, 850-51 (Ind.App.2004) ("Allowing the evidence of the prior allegation in this case would have required the jury to make a factual determination with regard to matters collateral to that for which Fugett was being tried, namely, whether T.M. made the prior allegation and whether the allegation was false. The trial court did not err in excluding the evidence."); *State v. Sieler*, 397 N.W.2d 89, 92 (S.D.1986) (justifying adoption of the "demonstrably false" standard for the admission of the victim's allegations against another on the ground that this burden of proof "appropriately keeps the focus on the defendant instead of turning the trial into one of the victim.") (citing *State v. Anderson*, 686 P.2d 193, 200

(Mont.1984)); *State v. Tarrats*, 122 P.3d 581, 588 ¶ 46 (Utah 2005) ("The attenuated factual circumstances surrounding the two allegations only deepens the problem with using the first allegation to make inferences about the second. Further, such evidence would confuse the issues and unnecessarily create a trial within a trial, which the rules of evidence specifically seek to avoid.").

N.B. Outside the rape-shield context, courts have used excellent language articulating the concern that allowing certain impeachment evidence will shift the trial's focus from the accused to the victim's extraneous conduct. *See, e.g., State v. Lindh*, 468 N.W.2d 168, 182 (Wis.1991) ("The trial court may prohibit cross-examination in a certain area where to permit it would open up extraneous matters, for the trial court 'has responsibility for seeing that the sideshow does not take over the circus.'") (quoting *United States v. Brown*, 547 F.2d 438, 446 (8th Cir. 1977)).

8. The State may also successfully obtain preclusion when the logical connection between the proffered evidence and the fact the defendant purportedly seeks to establish through its admission is weak, non-existent, or even downright irrational.

A. Cases standing for this proposition in the rape-shield context. *See Agard v. Portuondo*, 117 F.3d 696, 703 (2nd Cir. 1997) (upholding preclusion of questions regarding rape victim's prior consensual acts of anal intercourse, pursuant to New York's rape shield law, partly because, "as for the probative side of the equation, it is far from clear what bearing prior consensual experience with a particular sexual practice has on the probability of trauma occurring during a subsequent non-consensual act"); *State v. Oliver*, 158 Ariz. 22, 31, 760 P.2d 1071, 1080 (1988) ("We fail to see how an 11–year-old boy's bragging about his sexual conquests with several young girls is particularly probative of his character for truthfulness. Moreover, this evidence is unrelated to the matter in issue."); *id.* at 31-32, 760 P.2d at 1080-81 (rejecting the defendant's contention that the victim "had a retaliatory motive for testifying against [the defendant] because [the victim] was humiliated when he was observed masturbating in [the defendant's] trailer" because "it is far-fetched to assume that a teenage boy who is embarrassed when caught masturbating will retaliate by drawing attention to the fact that he has been a party to a homosexual relationship"); *State ex rel. Montgomery v. Duncan (Fries)*, 228 Ariz. 514, 516, ¶ 8, 269 P.3d 690, 692 (App.2011) ("It is not apparent to us how cross-examining the *Victim* on this evidence will aid in the truth-seeking process as to what *Defendant's* belief was as to the Victim's age. Thus, the only affirmative inquiry that needs to be made is whether Defendant, in *his* testimony, should be permitted to testify on direct about how the Victim's alleged statements that the Victim had previously engaged in oral sex led Defendant to conclude that the Victim was at least eighteen.") (emphasis in original); *State v. Lindsey*, 149 Ariz. 493, 498-99, 720 P.2d 94, 99-100 (App.1985), *aff'd in part and vacated in part*, 149 Ariz. 472, 720 P.2d 73 (1985) (in a prosecution for incest and sexual exploitation of a minor, evidence that

molestation victim had intercourse with others several weeks or months before and after her pregnancy was inadmissible for the purpose of demonstrating that defendant was not the father, as these acts occurred before and after the time of conception); *State v. Garcia*, 138 Ariz. 211, 216, 673 P.2d 955, 960 (App.1983) (precluding, in a rape prosecution, evidence of the victim's unchaste sexual conduct short of intercourse because it did not rebut the state's claim that she had been a virgin before the sexual assault); *State v. Holley*, 123 Ariz. 382, 385, 599 P.2d 835, 838 (App.1979) ("If the girls did not want Mr. Goldstein to find out that they had been having sex by consent, then there was no reason to tell the police anything. The contention of appellant's defense counsel that they told the police they had been raped in order to enhance their reputation so they could be rehired by Goldstein does not even make sense."); *State v. Jones*, 490 N.W.2d 787, 791 (Iowa 1992) ("Given the age of the victim at the time she testified, the education and counseling she had received in the interim between the abuse and the trial, and the rather unexplicit nature of the testimony; we find it unlikely that a jury would infer that the victim could only describe the act because Jones had, in fact, done it. The evidence of the victim's previous abuse is marginally relevant and is more prejudicial than probative.") (citing *State v. Oliver*, 158 Ariz. 22, 31, 760 P.2d 1071, 1080 (1988)); *People v. Scott*, 889 N.Y.S.2d 279, 281 (2009) ("Inasmuch as victim A's consent was not an issue with respect to the rape charge of which defendant was convicted …, the connection between her promiscuity and the credibility of her claim that sexual intercourse occurred is so tenuous and illogical that such evidence would have been irrelevant."); *People v. Segarra*, 847 N.Y.S.2d 564, 565 (2007) ("Regardless of whether the Shield Law applied, the connection between the proffered evidence and the victim's motive or ability to fabricate sodomy charges against defendant was so tenuous that the evidence was entirely irrelevant.").

B. Cases standing for this proposition in other contexts. *See Norris v. Schotten*, 146 F.3d 314, 330 (6th Cir. 1998) ("Furthermore, even though exposing the bias of a witness is a crucial aspect of cross-examination, a district court does not abuse its discretion nor violate the Confrontation Clause by prohibiting testimony where, as here, 'the relevance of such questions [i]s unclear and the risk of prejudice [i]s real.'") (quoting *United States v. Piche*, 981 F.2d 706, 716 (4th Cir. 1992)); *Wise v. Bowersox*, 136 F.3d 1197, 1205 (8th Cir. 1998) (because defendant had no evidence that the prosecution had any knowledge of "wanted" bulletins for its witness, let alone proof of a "deal" regarding the unrelated criminal activity, his "proposed line of inquiry had little relevance to the case but could have been highly prejudicial"); *United States v. Ellzey*, 936 F.2d 492, 497 (10th Cir. 1991) ("Furthermore, given the remote and tenuous link between the state charge and the federal testimony, we think that the district court did not abuse its discretion in excluding the questioning under Federal Rule of Evidence 403.").